**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
| | ) | |
| Unbundled Access to Network Elements | ) | WC Docket No. 04-313 |
| | ) | |
| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | ) | CC Docket No. 01-338 |

# REPLY COMMENTS OF ATX COMMUNICATIONS, INC. FREEDOM RING COMMUNICATIONS, L.L.C. D/B/A BAYRING COMMUNICATIONS CTC COMMUNICATIONS CORP. FOCAL COMMUNICATIONS CORPORATION GLOBALCOM, INC. MPOWER COMMUNICATIONS CORP. NTELOS, INC. RCN TELECOM SERVICES, INC. TDS METROCOM, LLC

Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Philip J. Macres
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Their Attorneys

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## SUMMARY

The RBOCs propose an impairment standard that would find no impairment based on the slimmest possible showing of use or deployment of alternative facilities by CLECs. Thus, according to RBOCs, no CLEC is impaired if any CLEC has used or built alternatives anywhere. It is no accident that the RBOCs have proposed this approach because the evidence gathered in state proceedings shows that there are remarkably few instances of alternative loop and transport facilities. In any event, their approach to impairment may not guide the Commission's impairment determinations because *USTA I* and *USTA II* require a more nuanced and granular analysis. Instead of the sweeping, unlawful impairment standard proposed by RBOCs, the Commission should retain the impairment standard adopted in the *TRO*.

The Commission should retain a location and route specific approach to impairment because barriers to entry vary from market to market and location to location. Because barriers to entry are location and route specific, MSA-wide tests would lead to too many inaccurate results. The "compromise" proposals offered by some of the RBOCs, which would fall short of the total elimination of unbundled access to loops and transport, would still lead to drastic reductions in unbundling notwithstanding impairment. These tests do not adequately assess impairment because they are based on the faulty assumption that wire center density is related to loop impairment, and, with respect to transport would set the threshold so low that DS1 transport would be virtually wiped out.

The Commission should instead determine impairment based on the capacity-based thresholds (2 DS3s for loops, 12 DS3s for transport) that were established in the *TRO*. These thresholds adequately address the potential for deployment because, below the capacity

thresholds there is no realistic potential that CLECs could deploy facilities, and the record reveals that there are few if any competitive wholesale alternatives. For DS-3 transport, the ALTS test is a reasonable alternative to the *TRO* capacity based triggers.

As demonstrated in our Comments, the consideration of special access does not alter the conclusion that CLECs are impaired without access to loop and transport UNEs. Only if special access is excluded can the Commission's unbundling scheme accomplish the Act's objective of assuring that, where competition relies on access to the legacy incumbent networks, the retail prices paid by consumers do not remain inflated as a result of incumbent pricing (whether retail or wholesale) that does not reflect the incumbent's actual ongoing costs. But even if special access were deemed relevant, the RBOC comments failed to acknowledge that the existing special access regime would be sufficient to assure competitive access at viable prices and that the ILECs would not subject competitors to untenable price squeezes.

The Commission should reject RBOC proposals that would effectively eliminate the availability of EELs. There is no need to overhaul EEL availability standards because, among other reasons, they were affirmed by *USTA II*. RBOC requests that the Commission require that CLECs use EELs for 100% local service would preclude their use entirely because CLECs, like all carriers, use their facilities inseparably for both interstate and intrastate communications. The Commission should keep in mind that EELs promote investment because they enable CLECs to expand coverage and use facilities more efficiently.

The Commission should reinstate unbundled access to entrance facilities. As suggested by *USTA II*, entrance facilities are network elements that must be unbundled if CLECs are impaired without access to them. In this connection, the Commission should apply the

appropriate loop or transport test to determine if CLECs are impaired without unbundled access to entrance facilities on a particular route.

States have authority to set the prices for Section 271 unbundled network elements. Although the Commission grants Section 271 applications, nothing in the Act precludes state commissions, in the context of an arbitration or otherwise, from setting the prices or other terms and conditions of Section 271 UNEs post grant. The 1996 Act did not limit, and in fact preserved, state authority over intrastate communications. At a minimum, states may exercise their authority to set prices for UNEs used to provide intrastate services.

The Commission should reject RBOC proposals to the effect that the only lawful transition to non-UNE status of any delisted network element, if the Commission makes any such determinations, is a flash cut to special access pricing. The multiyear transition established for line sharing, affirmed by *USTA II,* shows that the Commission may, and should, establish a reasonable transition period for any delisted UNEs. Contrary to RBOC arguments, the Commission may also provide for provisioning of new orders as UNEs for a reasonable period.

The Commission should not expand the scope of broadband unbundling relief by redefining the mass market to include business customers. A recent study by the Small Business Administration shows that on average most very small businesses use no more than 2 lines. Assuming the mass market includes any business customers, it should be confined to residential customers and business customers with no more than 2 lines.

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| QSI Report | Letter from Comptel/ASCENT *et al.* to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket Nos. 01-338, 96-98, and 98-147 (filed Oct. 4, 2004) |
| BellSouth Oct. 1, 2004 *Ex Parte* Letter | Letter from Glenn T. Reynolds, Vice President Federal Regulatory, BellSouth Corporation, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 1, 2004) |
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ATX Communications, Inc.; Freedom Ring Communications, L.L.C. d/b/a BayRing Communications; CTC Communications Corp.; Focal Communications Corporation; Globalcom, Inc.; Mpower Communications Corp.; Ntelos, Inc.; RCN Telecom Services, Inc.; and TDS Metrocom, LLC (collectively "Commenters") hereby file their reply comments in the above-captioned proceedings regarding unbundling rules that will implement the obligations of section 251(c)(3) of the Communications Act of 1934, as amended,[1] in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's decision in *USTA II*.[2]

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[1] Commenters refer to the Communications Act of 1934, as amended, *inter alia*, by the Telecommunications Act of 1996, as the "Communications Act", the "'96 Act" or the "Act." *See generally* 47 U.S.C. § 151 *et seq*.

[2] *USTA II*, 359 F.3d 554.

## I. THE RBOCs' PROPOSED IMPAIRMENT TEST WOULD VIOLATE *USTA I* AND *USTA II*

The RBOC position on impairment is simple, and simply wrong. The RBOCs claim that the existence of any degree of non-UNE competition in a specific market, whether by self-provisioning, third-party provisioning, use of ILEC facilities through special access, or any combination, is "dispositive" evidence of non-impairment in that market and in all similarly situated markets.[3] In practice, the RBOC test would result in a rule that competitors are not impaired unless competition is *impossible* without access to UNEs.[4] Their position ignores both the statutory text and the D.C. Circuit's own recognition that,

> the statutory structure suggests that "impair" must reach a bit beyond natural monopoly. While for "proprietary" network elements the statute mandates a decision whether they are "necessary," §251(d)(1)(A), for non-proprietary ones it requires a decision whether their absence would "impair" the requester's provision of telecommunications service, §251(d)(1)(B).[5]

The Commission therefore cannot rationally adopt an impairment standard that fails to distinguish between "necessity" and mere "impairment," which must mean something less than sheer impossibility. The RBOC position also flies in the face of the Supreme Court's admonition

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[3] *See* Verizon Comments at 14-27; SBC Comments at 26-34; BellSouth Comments at 9-12; Qwest Comments at 18-31.

[4] Verizon Comments at 8 (the Commission "must consider evidence demonstrating that competition is *possible* without UNEs"), 12 (the "fundamental question ... is whether competition is *possible*") (emphasis added); SBC Comments at 26 (Commission must consider "whether competing providers *can* offer service without access to the facility in question"); BellSouth Comments at 11 (the Commission "must determine where 'competition is possible' without access to unbundled network elements") (quoting *USTA II* out of context).

[5] *USTA II*, 359 F.2d at 572.

that an impairment standard must be "rationally related to the goals of the Act,"[6] which the Court found were "to reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers, even if that meant swallowing the traditional federal reluctance to intrude into local telephone markets."[7] An impairment standard that seeks to permit only the absolute minimum unbundling necessary to prevent a pure monopoly would plainly not be "rationally related" to this goal.

*USTA I* required the Commission to apply "a more nuanced concept of impairment."[8] As a result, the Commission adopted a granular approach after *USTA I* to account for the differences in customer classes and geographical areas, including location-by-location review.[9] The location-by-location or route-by-route analysis fully complies with the requirements of *USTA I* and is the most appropriate method to measure impairment when granularity is required. This localized analysis will provide the most accurate results because CLECs tend to make entry decisions based on an economic analysis at a particular location.[10] Localized analysis is also consistent with the economic criteria used to define markets for antitrust analysis.[11]

In addition, customers will be benefited by a localized analysis. For example, a competitor offering service to a customer located at South Capitol Street and Howard Road in

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6 *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 388 (1999).

7 *Verizon v. FCC*, 535 U.S.467, 489(2002).

8 *USTA I*, 290 F.3d at 425-426.

9 *TRO*, ¶ 118.

10 MCI Comments at 37.

11 *See* John. W. Mayo et. al. Mayo/MiCRA/Bates White Economic Impairment Analysis (Oct. 2004) ("*Bates-White*") filed as an attachment to ex parte of John W. Mayo, Georgetown University, to Marlene H. Dortch, Secretary, FCC at 32-35 (filed Oct. 4, 2004).

Washington, D.C. may be impaired without access to UNEs, even though a facilities-based competitor offers service in a nearby building located at 17th and K Streets. Consequently, the customer residing in the building at South Capitol Street may not reap the benefits of competition if the Commission adopted a broader approach because facilities based service to that location may be cost prohibitive for competitors and the broader approach would preclude any competitor from providing service using UNEs. Rather, only a localized granular analysis would ensure the availability of competitive alternatives to all locations within a given market.

Accordingly, the Commission should reject the proposals of Verizon and BellSouth to define the relevant market as a Metropolitan Statistical Area ("MSA").[12] Localized analysis is likely to produce fewer errors relative to non-impairment determinations in areas where impairment actually exists and vice versa than if a broad geographic approach is used.[13] Under an MSA approach, the existence of a facilities-based competitor at 17th and K Streets in Washington, D.C., would lead not only to a finding of non-impairment at distant locations outlying the District of Columbia, where impairment may in fact exist, but it would also lead to a finding of non-impairment in the outer reaches of the Washington DC MSA, such as Charles Town, West Virginia, which has a population 3,180 and is 63 miles from Washington.[14] Indeed

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[12] Verizon Comments at 24-27; BellSouth Comments at 10.

[13] AT&T Comments at 15-22.

[14] *See* http://www.census.gov/population/estimates/metro-city/0312msa.txt; http://www.census.gov/popest/cities/SUB-EST2003-04.html; http://www.city-data.com/city/Charles-Town-West-Virginia.html. Other examples where this would also happen is the Riverside-San Bernadino-Ontario CA MSA. It stretches all the way across the state to Arizona and Nevada and includes the vast majority of the Mojave Desert including a portion of the Death Valley National Park. On the far end of the MSA is Needles CA, which is 225 miles from San Bernadino and has a population 4,830. In addition, the Las Vegas-Paradise MSA

the *USTA II* court recognized that "it may be infeasible" to use MSAs or other such broadly defined markets in the impairment analysis.[15]

The RBOCs further argue that the Commission can find non-impairment in any market and in all similarly situated markets where non-UNE competition exists and could be defined to include self-provisioning, third-party provisioning, tariffed offerings, or intermodal services.[16] This overly broad approach would not take into account the granular analysis that that *USTA I* required, the *TRO* adopted, and *USTA II* subsequently affirmed. To comply with *USTA I* and to avoid making a finding detached from specific markets or market categories, the Commission must analyze impairment, even if non-UNE competition may exist at some level or along certain routes in the relevant market. Further, the Commission cannot extend a finding of non-impairment in one market based on the existence of non-UNE competition in that market to another market hundreds or thousands of miles away, simply because that market may share certain common characteristics with the market in which there was a finding on non-impairment.

Because it is impossible to define a "similarly situated" market clearly – and the RBOCs have clearly failed to do so, the Commission should also reject their recommendation to apply non-impairment findings to "similarly situated" markets. Qwest suggested that markets are

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stretches up to the middle of Nevada and includes towns like Carvers, NV in the Big Smoke Valley, approximately 269 miles from Las Vegas as well as East Manhattan, a mining ghost town in the Toquima Mountain Range in central Nevada.

[15] *USTA II*, 359 F.3d at 575; *see also* AT&T Comments at 15.

[16] *See* Verizon Comments at 22-24; SBC Comments at 29-30; BellSouth Comments at 10; Qwest Comments at 18-19.

similar when they are the same size and share similar economic characteristics.[17] The demographic and economic characteristics of a market are not always relevant to the degree of non-UNE competition that may or may not exist in a particular market. As demonstrated by the examples above, examining demographic and economic characteristics alone may inaccurately result in a non-impairment finding when a market is too broadly defined.

## II. CONSIDERATION OF SPECIAL ACCESS DOES NOT ALTER THE RESULT OF THE COMMISSION'S IMPAIRMENT ANALYSES

The CLECs' prior comments amply demonstrate that the availability of special access does not alter the result of the Commission's impairment analyses because the Act charges the Commission to determine whether CLECs are impaired without the network elements the incumbents use to provide special access. Only this formula can be expected to accomplish the Act's objective of assuring that, where competition relies on access to the legacy incumbent networks, the retail prices paid by consumers do not remain inflated as a result of incumbent pricing (whether retail or wholesale) that does not reflect the incumbent's actual ongoing costs. Accordingly, it is irrelevant for purposes of the impairment analysis under the Act whether the ILECs special access rates are "competitively priced" or whether they are structured in a manner that protects competitors and consumers from a price squeeze. However, for the sake of the record, the Commenters address these two issues below.

### A. The RBOCs Ignore the Likelihood of a Price Squeeze on CLECs

As discussed in the Commenters' initial Comments, special access does not adequately protect against a RBOC price squeezing practices. Notably, none of the RBOCs address the

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[17] Qwest Comments at 18-19.

likelihood of a price squeeze in the event that CLECs are limited to special access services for loop and transport facilities. Rather, the RBOCs simply claim that special access is competitively priced and use of special access by CLECs demonstrates that CLECs are not impaired without UNES.[18] The RBOCs failure to address this obvious problem in their comments evidences their inability to refute this important argument.

In other proceedings, the FCC has recognized the importance of UNEs in protecting the industry from ILEC price squeezing practices. For instance, in the *LEC Classification Order,*[19] the FCC addressed the possibility of RBOC price squeezes in the context of RBOC in-region entry into the interLATA long distance market and noted that the risk of such discrimination could be mitigated by a combination of separate affiliate requirements, price cap regulation of RBOC exchange access services and the "ability of competing carriers to acquire access through the purchase of unbundled network elements."[20]

If CLECs were required to rely exclusively upon special access to provide service without the protection of UNEs, in those MSAs subject to flexible pricing, ILECs would have the ability and incentive to discriminate through price squeezing. Indeed, hardly any of the protections the FCC has relied upon in the past to protect carriers from RBOC price squeezes

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[18] Verizon Comments at 62; BellSouth Comments at 37; SBC Comments at 62, Qwest Comments at 65

[19] *See* Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate Marketplace, Second Report and Order, 12 FCC Rcd 15756 (1997) ("*LEC Classification Order*").

[20] *LEC Classification Order* at ¶ 126; *see also* Comments of ALTS, et al, p. 20, n.18 (noting the special emphasis that the FCC placed on the availability of UNEs to partially protect CLECs from a price squeeze; *see also* Comments of ALTS *et al.* at 19-23.

apply in most CLEC markets. The separate affiliate requirements and affiliate transaction rules do not apply to ILECs who provide local exchange, exchange access and, in almost all cases, broadband services on an integrated basis. In addition, as discussed in the Commenters' Initial Comments, ILECs enjoy pricing flexibility for special access in many MSAs and thus price caps and service quality regulations do not provide any protection to CLECs from price squeezes. For instance, when an ILEC receives Phase II pricing flexibility, all regulatory constraints on special access prices effectively are removed as the ILEC simply has to file tariffs for its special access services without any supporting cost data.[21] Without any regulatory constraints on special access prices, the ILECs have the incentive and ability to engage in a price squeeze.

### 1. RBOCs Do Not Have the Same Incentives to Engage in Predatory Squeeze Behavior with Respect to CMRS Carriers as CLECs

Moreover, any argument that RBOCs have not heretofore engaged in price squeezing behavior with respect to services provided to CMRS carriers is irrelevant for purposes of considering the likelihood of a price squeeze on CLECs. RBOCs do not have the same incentives to engage in price squeezing behavior with respect to CMRS and long distance carriers because the RBOCs have partially or wholly-owned affiliates that provide such services in those markets. For instance, SBC owns 60 percent of Cingular, while Bell South owns the other 40%, and Verizon owns 55 percent of Verizon Wireless. Similarly, Qwest owns 100 percent of its CMRS resale operations, which are provided through Sprint PCS. As noted by others, since the RBOC-affiliated CMRS providers must offer service in the territories of the other RBOCs and those RBOCs have their own affiliated CMRS operations, all of the RBOCs

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[21] *See generally Pricing Flexibility Order.*

are less likely to engage in price discrimination in the CMRS market because of the fear of retaliation by their RBOC counterparts.[22] Accordingly, it would not make economic sense for RBOCs to engage in price squeezing practices in these markets.

In addition, the financial strength of unaffiliated CMRS carriers reduces the likelihood that the RBOCs would engage in price squeezing practices in the CMRS market. Most CLECs, on the other hand, do not have such financial strength and are thus, susceptible to RBOC price squeezing practices. Finally, as noted by AT&T, special access only represents a very small amount of a wireless carrier's total operating costs and even a smaller fraction of their overall costs. In contrast, a wireline carrier's network architecture is comprised largely of wireline loops and transport facilities, which represent a far greater portion of a wireline provider's operating and overall costs. Because of the relatively lighter reliance on special access by CMRS carriers, the RBOCs do not have an ability to price squeeze CMRS carriers to the same degree as wireline carriers.[23] Moreover, when a wireline carrier purchases special access in the form of a last mile loop or a combination loop-transport facility, the facility is generally specifically designed to serve an individual customer. If the carrier loses that customer, it no longer needs the special access circuit. In contrast, the loss or addition of a single customer generally does not affect a CMRS carrier's special access purchases, since their reliance on special access is generally for network infrastructure.[24] CLECs purchasing special access facilities under long term contracts in an effort to manage their costs, are burdened with the responsibility of either "load balancing"

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[22] *See* ALTS *et al.* Comments at 15.

[23] *See* AT&T Comments at 125, 126.

[24] *Id.*

their special access facilities or incurring potentially large termination penalties when service is discontinued by their end user customer.

### 2. RBOCs Do Not Have the Incentive or Ability to Engage in Price Squeeze Behavior With Respect to IXCs

For many of the same reasons, the RBOCs do not have the incentive or the power to discriminate against long distance carriers. Indeed, the Commission has noted that IXCs and large businesses who purchase large amounts of special access are unlikely to be affected by ILEC price discrimination because these businesses generate significant revenues for the ILEC. As such, they have bargaining power with the ILECs.[25] CLECs do not enjoy such bargaining power.

## B. BOCs' Current Pricing of Special Access is Irrelevant

Verizon argues that special access is competitively priced as evidenced by the decrease in the *average* revenue per special access line sold by the RBOCs during the period of pricing flexibility.[26] Similarly, SBC claims its evidence shows that special access is competitively priced and that CLECs have been successfully competing for all kinds of customers using special access that is purchased at deep discounts off the tariffed base rates.[27]

Assuming *arguendo* that the RBOCs' figures are correct, the *current* pricing for special access is largely irrelevant because such pricing has been developed with the availability of UNEs in mind. If ILECs are no longer required to offer UNEs, they would be free to increase the price of special access services. Indeed, as discussed above in section B above, UNEs are the

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[25] *See Pricing Flexibility Order,* at ¶ 142.

[26] Verizon Comments at 62, 63.

[27] SBC Comments at 62.

only remaining incentive to prevent the RBOCs from discriminating against CLECs through a price squeeze. Absent UNEs, special access rates would increase to levels that would drive CLECs from the market. Such a result is contrary to the goals of the Act, which is to promote competition.

Verizon and SBC also argue that special access prices have declined over the last few years. Verizon states that based upon its analysis of the *average* revenues it earns per DS1 special access line, Verizon's special access rates have declined since 2001.[28] The Commission should be skeptical of these figures. First and most important, the figures used by Verizon and the analysis conducted by its chosen expert, Mr. William E. Taylor, only account for an *average* of the RBOCs' special access revenues. The declining numbers cited by Verizon and Mr. Taylor likely can be attributed to the fact that certain large carriers who rely heavily on special access transport facilities and large business customers have locked into long term discounted plans, thereby reducing the *average* revenues for special access lines. By examining only the average special access revenues, Mr. Taylor has not accounted for the special access prices that are levied on smaller CLECs who are unable to take advantage of long term plans. It is not possible for CLECs who provide service to small and medium size businesses using DS1 facilities to take advantage of the long term special access prices, as these customers are not willing to sign contracts longer than one year. Since most special access discounts require a 3 or 5 year commitment, the RBOC figures concerning average special access revenues are not indicative of

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[28] Verizon Comments at 62-63, Taylor Dec. ¶ 12 (stating that both RBOC and Verizon special access revenue have continued to decline in nominal and real terms and at a faster rate during the period in which limited pricing flexibility has been available to these companies in certain areas).

the marketplace. Thus, any reliance on the average revenues is misplaced and should not be considered by the Commission.

Moreover, Verizon and SBC argue that that the significant rates of return that RBOCs earn on special access should be disregarded because such rates are based on ARMIS data.[29] This argument is nonsensical and begs the question - what data should be relied upon if not ARMIS data? Further, Verizon's argument for not relying on ARMIS data is specious.[30] If anything, the ARMIS data showing the significant rate of return is consistent with the Ad Hoc Users Report, which shows that in markets subject to pricing flexibility, the rates for special access have generally increased over the years to amounts unreasonably in excess of cost.[31] Nor have the RBOCs otherwise explained what their rates-of-return are for special access. Accordingly, the Commission should disregard Verizon's argument and instead rely upon both the ARMIS data and the Ad Hoc Users Report, which evidences the unreasonable revenue that Verizon and the other RBOCs are earning from special access revenue.

Finally, both Verizon and SBC argue that small carriers can avail themselves of the special access discounts by buying from aggregators.[32] Verizon states that CLECs can obtain the "maximum discounts contained under Verizon's tariffs by purchasing service from one of the

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[29] Verizon Comments at 62- 63; SBC Comments at 63.

[30] Verizon submits that because the Commission has found that ARMIS data does not serve a ratemaking purpose, it is in appropriate for CLECs to rely upon such data as evidence of the RBOCs' special access profits. *See* Verizon Comments at 63, n. 59. Verizon's argument is baseless. CLECs are not relying upon ARMIS data for a special access ratemaking; rather, CLECs are using such data to demonstrate that the RBOCs' special access margins are unreasonably high.

[31] *See, e.g.*, Ad Hoc Users Report at 27-40.

[32] Verizon Comments at 39, 64-65; SBC Comments at 67.

several aggregators that assist CLECs to obtain access to each other's networks, and to aggregate their demand in order to obtain access to ILEC special access at substantial discounts."[33]

The Commenters understand that a number of assertions concerning aggregators in the RBOC report are exaggerated and inaccurate and may be corrected in the record by these providers. Based on Verizon's reliance on unsupported and inaccurate information to support its argument that CLECs can compete using special access, the Commission should be skeptical of all information submitted by Verizon related to CLECs use of special access.

For all of the reasons discussed above, the Commission should not rely upon CLECs use of special access in its impairment analysis.

## III. CLECs ARE IMPAIRED WITHOUT ACCESS TO "LOW CAPACITY" DS1, DS3 AND DARK FIBER LOOPS AND TRANSPORT

As discussed below, CLECs are impaired without access to low capacity DS1, DS3 and dark fiber loops and transport. RBOC impairment evaluations are not route or location based and rely heavily on the availability of special access. Moreover, they rely on gross generalities and tenuous inferences, and erroneous assumptions and data that do not properly assess whether CLECs are impaired. Consequently, their proposals would result in too many false negatives (findings of non-impairment when impairment actually exists) which is contrary to what *USTA II* requires.

A far better approach would be for the Commission to adopt a strict "bright line" impairment test that is based on the 2 DS3 loop and 12 DS3 transport capacity thresholds the Commission established in the *TRO*. Because this test is more granular than the RBOC

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[33] Verizon Comments at 64.

proposals and would minimize false positives (unlike the RBOC test), *USTA I* and *USTA II* support the Commission's adoption of it. The Commission should also treat DS1 loops and DS1 EELs as a protected class of UNEs and not lump them in with DS3 and dark fiber in any non-impairment findings it may make.

### A. RBOC Proposals Do Not Adequately Assess Impairment

#### 1. *USTA I* and *USTA II* Support Having Impairment Decisions Made on a Capacity, Location, and/or Route Specific Basis Not MSA

The RBOCs, namely Verizon, SBC and Qwest argue that impairment decisions for "low capacity" DS1,[34] DS3 and dark fiber facilities should be made based on a MSA market definition where the demand for high-capacity services is highly concentrated.[35] For instance, the RBOC "Fact Report" indicates that 80% of the demand for high-capacity services is concentrated in 18% of its wire centers.[36] RBOCs maintain that these wire centers are located in the top MSAs of their serving areas and demand is concentrated within large office buildings and business parks.[37] They contend that competitors focus on these market areas when offering high-capacity services because customer demand is concentrated in these areas.[38] They further submit that once a competitor decides to offer high-capacity services in a particular market area, it can

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[34] RBOCS have gone to absurd extremes in treating DS1 facilities and DS3 high capacity facilities the same for impairment purposes. A DS1 has a maximum capacity of 1.544Mbps that only supports 24 DS0s whereas a DS3 has a maximum capacity of 34.368 Mbps that supports 28 DS1s or 674 DS0s. Otherwise said, a DS1 has only 4.5 percent of the capacity of a DS3. Therefore, DS1 has low capacity when compared to a DS3.

[35] *See* Verizon Comments at 36-38; SBC Comments at 64-65; Qwest Comments at 88.

[36] RBOC UNE Fact Report 2004 at III-8.

[37] *See, e.g.,* Verizon Comments at 36; SBC Comments at 66.

[38] *See* Verizon Comments at 37; Qwest Comments at 66 & 88; SBC Comments at 64-69.

provide such services throughout the area, wherever demand exists, by using their own or competitive facilities or special access services. [39] The crux of their case is based on the RBOC UNE Fact Report 2004 and summary maps that depict where competing carriers are providing high-capacity services where concentrated customer demand exists by using either special access services or their own or alternative fiber facilities in those MSAs.[40]

The RBOCs' MSA proposal should be rejected because it relies on the availability of special access services. For reasons explained above and in our initial comments, special access should not be considered in determining if CLECs are impaired without access to UNEs. Apart from that, *USTA I* requires that the Commission perform a granular analysis when determining impairment and *USTA II* indicated that the impairment definition should be a "nuanced" analysis that sensibly defines the markets in a manner that minimizes false negatives, *i.e.*, erroneous findings of non-impairment.[41] The RBOC proposal, however, is non-granular and relies on gross generalities. It mistakenly assumes that if CLECs are able to deploy loops to one location out of one wire center, they are not impaired without access to loops serving all the locations served by the wire center. Likewise, with transport, RBOCs assume that if CLECs have deployed transport

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[39] Verizon Comments at 38; SBC Comments at 62; Qwest Comments at 62.

[40] *See, e.g.*, SBC Comments at 67 & n.219; Verizon Comments at 49; Qwest Comments at 80 & n.286; BellSouth Comments at 36-37. In making this argument, RBOCs point to the Commission's Pricing Flexibility Order that allows RBOCs to have pricing flexibility where there is sufficient collocation by competitors in an MSA. RBOC UNE Fact Report at III-31 & n. 94 (citing *Pricing Flexibility Order*) ; Verizon Comments at 43 (same). This test is, however, inapposite to an impairment determination because it does not examine if CLECs are impaired without access to DS1, DS3 and dark fiber loops and transport facilities to certain locations or on particular routes. For the reasons stated below, the Commission must adopt a more granular test.

[41] *USTA I*, 290 F.3d at 422; *USTA II*, at 574.

on a given route between wire centers, then CLECs are not impaired without access to other transport even if no alternative facilities exist on those routes.

Because of this, it would produce exceptionally high levels of false negatives in comparison with an impairment standard that is more granular and that evaluates whether a CLEC is impaired based on a capacity and route/location specific analysis. The unfortunate reality is that even in an MSA where there is some evidence that competitive wholesale fiber is available on certain routes, there are few (and often no) DS1, DS3, and dark fiber loop and transport alternatives on other routes in that MSA.[42]

Tellingly, assuming the RBOC submissions are correct in that 80% of the demand for high-capacity services is derived from 18% of RBOC wire centers that are located in concentrated areas in the largest MSAs, the mere fact that fiber-based collocators are present in just over half of these wire centers demonstrates that fiber alternatives are actually only available in closer to 9% of RBOC wire centers.[43] Perhaps more telling, nothing in this reveals if self- or wholesale provisioning to all loop locations and on all transport routes is warranted, justified or available out of the 55% of the end offices where fiber collocators are supposedly present. Nor does it address the high-capacity facilities that small and large businesses may require in the remaining 82% of wire centers in these MSAs.

Furthermore, even if RBOCs could prove that fiber based collocators offered wholesale low capacity DS1, DS3, and dark fiber loops and transport out of the end offices where

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[42] *See, e.g.,* QSI Report at 2-3.

[43] RBOC UNE Fact Report at III-8.

concentrated demand for high-capacity services exists (which is virtually never the case) and if an MSA approach were adopted as advocated by the RBOCs (which the Commission should not do), the odds of false findings of non-impairment out of the 45% of the wire centers that have concentrated demand for high-capacity services but do not have fiber based collocators would be 100%. Clearly, the RBOC MSA approach is unsound and is drastically more prone to error in determining impairment than the granular approach previously adopted by the Commission in the *TRO* and supported by the Commenters.

Indeed, as many CLECs submit, impairment determinations regarding DS1, DS3 and dark fiber loop and transport should, consistent with Commission's *TRO* decision, be based on a capacity and location or route-specific market analysis.[44] Specifically, the Commission identified in the *TRO* two considerations that would be the fundamental basis upon which impairment determinations should be made.

First, the *TRO* held that loop and transport impairment should be determined on a capacity-specific basis.[45] *USTA II* didn't overturn that decision or criticize it. The *TRO* performed its impairment analysis "based on capacity level because it is a more reliable indicator of the economic abilities of a requesting carrier to utilize third-party alternatives, or to self-deploy."[46] Significantly, basic economics associated with the deployment of transmission facilities support this finding. In addition, this approach recognizes that loops and transport are

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[44] *See, e.g.,* MCI Comments at 133; Sprint Comments at 27-28; AT&T Comments at 13.

[45] *TRO*, ¶¶ 307 & 376.

[46] *TRO*, ¶ 376.

essential ILEC facilities because constructing them involves incurring enormous fixed costs that do not vary with the capacity of the facilities deployed. It further recognizes that incumbents are able to provide their loop and transport facilities on a ubiquitous basis throughout an entire market because they can spread such costs of deploying them across many customers and achieve extremely low per unit costs. Unlike ILECs, competitive carriers face practically "insurmountable" barriers to entry if they attempt to replicate the ubiquitous loop and transport facilities that ILECs have deployed since only the ILECs benefit from the economies of scale associated with deploying them on a ubiquitous basis.[47] Furthermore, without having access to these facilities at TELRIC-based rates, competitive carriers face real and potential price squeezes (as previously discussed) in attempting to provide any service that utilizes basic loop and transport facilities.[48]

Accordingly, the ability to self-deploy a high-capacity loop at a location or a transport route between ILEC wire centers is contingent upon a carrier's ability to ensure that traffic volumes meet capacity requirements. It would not be cost effective for a carrier to self deploy its own high-capacity facilities in any market or along any route, unless and until it can be demonstrated that traffic volumes so warrant. Thus, whether a particular carrier can deploy its own transmission facilities, should be determined based on whether that specific carrier has a sufficient amount of traffic volumes at a given location or on a certain route to justify the investment of the substantial fixed costs necessary to construct a specific new loop or transport

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[47] *See Verizon*, 535 U.S. at 484.

[48] *See also* AT&T Comments at 13.

transmission facility.[49] The *TRO* recognized this and held that "[b]ecause a carrier using higher capacity levels of transport has a greater incentive and broader revenue base to support the self-provisioning of transport facilities, we adopt an approach to analyzing transport that considers different capacity levels."[50] As discussed below, this also demonstrates that the appropriate inquiry needs to be carrier specific because even if one carrier has sufficient traffic volumes at a certain location or on a particular route to justify deployment of facilities that does not mean, *ipso facto*, that others do.

Significantly, *USTA II* did not criticize the Commission's finding that impairment differs according to the capacity of the transmission facilities and did not overturn the Commission's application of a carrier-specific, capacity-specific test. In fact, this is a nuanced analysis that serves to limit erroneous impairment and non-impairment determinations, which is exactly what *USTA II* demands.

Second, the Commission held that loops and transport impairment should be determined on a location and route-specific basis, respectively. Notably and contrary to RBOC arguments,[51] *USTA II* did not overturn or criticize implicitly or explicitly the Commission's location specific non-impairment analysis that should be used in determining if high-capacity loops should remain

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[49] This of course recognizes that the traffic level that the carrier has in other parts of the MSA, and the traffic level that other carriers have on that route, are not relevant.

[50] *TRO*, ¶ 377; *see also TRO*, ¶ 307 (adopting an approach to analyzing loops that considers different capacity levels).

[51] Verizon Comments at 33.

unbundled.[52] While it found that the Commission did not fully justify its route-specific transport analysis, that can be remedied easily.

In particular, *USTA II* indicated that the Commission must address whether a route-by-route analysis represents the best means of identifying impairment and that it should consider whether MSAs or other possible geographic markets would have higher "error costs" in terms of "false positives" and "false negatives."[53] The Commission can answer the Court's call for additional support even though the Commission has already considered the alternatives and has identified the route-by-route approach as being sounder than an MSA approach in determining transport impairment.[54] Indeed, this approach is more granular in that it examines whether CLECs have self-provisioned facilities or if they are available on a wholesale basis. It therefore is far less prone to incorrect impairment findings than a broad brush MSA approach that does not examine impairment in this manner. Apart from this, a route-by-route impairment inquiry can be readily administered through the use of capacity thresholds (2 DS3s for loops and 12 DS3s for transport), as CLECs recommend, and as discussed later herein because the thresholds are a simple approach to determining whether the deployment of alternative facilities is or is not economic.[55]

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[52] *TRO*, ¶ 328.

[53] *USTA II*, at 574-75.

[54] *TRO*, ¶ 397.

[55] *See, e.g.*, MCI Comments at 128; AT&T Comments at 26. Such a capacity test does not "ignore facilities deployment along similar routes when assessing impairment." *USTA II*, at 575. Rather, it recognizes that based on the level of traffic or customer demand, facilities deployment is feasible throughout a market when the level of capacity needed to satisfy such demand or

In addition, a route-by-route impairment analysis properly considers the economic realities associated with an impairment inquiry. As discussed above, a specific carrier's ability to deploy DS1, DS3, or dark fiber facilities is a function of whether that carrier has sufficient traffic on a given route to justify the tremendous fixed sunk costs needed to construct a facility. RBOCs cannot reasonably dispute this point. Therefore, a CLEC's capacity on a route will dictate when the sunk fixed cost entry barriers of deploying any facilities can be recovered through traffic volumes and customer demand.

For these reasons, the Commission should therefore reaffirm its finding that impairment is determined based on a location/route-specific and carrier-specific basis because the fundamental economic evidence submitted in this proceeding supports doing so. This approach is more granular as *USTA I* required and consistent with *USTA II* because it would minimize the chances for erroneous impairment finding or minimize false negatives (a finding of non-impairment where impairment exists) than the MSA approach proposed by the RBOCs. Given that and the fact that a false negative means that there are no competitive alternatives to locations or on routes whereas a false positive results in the unbundling of legacy ILEC facilities (since broadband network elements are no longer available as UNEs), the Commission must act to minimize false negatives because there is more public harm caused by possible false negatives than false positives.

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traffic level requires more than 2 DS3 to a location for loops or 12 DS3s on a specific route for transport. Because this threshold applies throughout an ILEC's monopoly serving area, it includes far more than just similar routes.

### 2. RBOC Arguments and Their "Fact Report" Do Not Establish Non-Impairment for DS1, DS3 or Dark Fiber Loops and Transport on a Capacity, Location, and Route Specific Basis

RBOCs generally argue that CLECs are not impaired without access to DS1, DS3 and dark fiber loop and transport facilities because a variety of charts and maps in with the RBOC UNE Fact Report 2004 purportedly show that competing providers have deployed extensive fiber facilities (both in terms of local fiber routes and fiber-based collocation at RBOC wire centers) in the MSAs in which demand for high-capacity services is concentrated.[56] RBOCs contend that these networks are capable of and are being used to provide loop and transport services.[57]

With respect to transport, RBOCs generally gathered their information regarding known competitive fiber routes from GeoTel (a third-party source). Verizon also performed physical inspections of selected central offices with high demand levels for high-capacity services to identify those which competing providers have obtained fiber-based collocation.[58] The RBOC UNE Fact Report indicates that competing fiber providers are located in the 55% of the end offices where 80% of demand for the high-capacity special access services are concentrated.[59] RBOCs maintain that where competitive fiber is present, it is "reasonable to assume" that competing carriers can use fiber to provide transport between wire centers with competitive fiber

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[56] Verizon Comments at 42-44; SBC Comments at 64, 67, 87 & n.219; Qwest Comments at 78 & 79; BellSouth Comments at 36; *see also* BellSouth Oct. 1, 2004 *Ex Parte* Letter Attachment 1.

[57] Verizon Comments at 42.

[58] Verizon Comments at 43-44; Verizon's July 2, 2004 *Ex Parte* Letter, Attachment 1 at 10; SBC Comments at 67 & n.219 (citing its Aug. 18, 2004 *ex parte*); BellSouth's Oct. 1, 2004 Ex Parte Letter at n.5; Qwest Aug. 20, 2004 *Ex Parte* Letter, Attachment 1 at 2-3.

[59] RBOC UNE Fact Report at III-8.

or that it is possible to establish connections between wire centers.[60]

As to loops, RBOCs generally obtained data from third-party sources such as GeoResults and/or Universal Access that identifies the office buildings that competing carriers have lit with fiber.[61] RBOCs contend that this evidence shows that competing providers are using fiber to connect directly to office buildings throughout the markets in which they have deployed fiber and that there are hundreds of individual buildings already connected to CLEC fiber networks, with the heaviest concentration in the areas where there is the most significant demand for high-capacity services.[62] Verizon also obtained data that estimate the typical aggregate demand for high-capacity services in buildings served by competitive fiber.[63] It states that this data demonstrates that competing providers have deployed fiber to a majority of buildings with high estimated telecommunications expenditures.[64] RBOCs further aver that both fixed and wireless and cable networks provide additional competition in the supply of high-capacity loops.[65]

As discussed below, these RBOC positions are specious and should be rejected outright because they do not provide the Commission with specific evidence needed to determine if

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[60] *See* RBOC UNE Fact Report at III-29; Verizon Comments at 45; *see also* SBC Comments at 70-71; Qwest Comments at 88.

[61] Verizon Comments at 48; BellSouth Comments at 45; SBC Comments at 67; Qwest Aug. 20, 2004 *Ex Parte* Letter, Attachment 1 at 2.

[62] Verizon Comments at 49; SBC Comments at 84-85; BellSouth Oct. 1, 2004 *Ex Parte* Letter at 2; Qwest Aug. 20, 2004 *Ex Parte* Letter, Attachment 1.

[63] Verizon Comments at 50.

[64] Verizon Comments at 50-51.

[65] RBOC UNE Fact Report 2004 at III-36-37; Verizon Comments at 51-52; SBC Comments at 87; Qwest at 82.

CLECs are impaired without access to DS1, DS3 and dark fiber loops and transport UNEs. Their arguments, supporting assumptions, and facts are not only irrelevant but also suffer from numerous defects that are fatal to the RBOCs' case.

### a) RBOC Assumptions are Wrong and Irrelevant

First, the existence of fiber at certain wire centers (fiber-based collocation), certain locations, or on certain fiber routes in an MSA, does not mean that CLECs are not impaired without access to DS1, DS3 and dark fiber loops at those places. Nor does it provide any information as to whether these fiber facilities are available on a wholesale basis at the DS1, DS3 or dark fiber capacity level. As the record reveals and as shown below, it is uneconomic to self-deploy such facilities that are limited to these capacity levels. Contrary to RBOC arguments,[66] business plans no longer operate on the "build it and they will come" strategy.[67] Moreover, even if the RBOCs' information regarding the number of lit buildings is correct and there are wholesale options at these locations, the numbers reveal that competitors are serving a tiny fraction (just over one percent) of all the commercial buildings in the nation.[68]

Second, the RBOC data erroneously assumes that CLECs can easily and economically add transport routes or reach buildings with fiber.[69] Record evidence, however, clearly proves otherwise. Indeed, there are significant costs associated with deploying a transport route or a

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[66] Qwest Comments at 85.

[67] *See* AT&T Comments at 18. Many CLECs filed for bankruptcy as a result of this imprudent business strategy. *Id.* Now CLECs only build facilities when they have specific demand and the deployment of facilities is economically rational. *Id.*

[68] AT&T Comments, Selwyn Dec. ¶ 44; *see also* QSI Report at 2-3.

[69] RBOC UNE Fact Report 2004 at III-16, III-29.

lateral to a building. As discussed below, the only time actual loop deployment becomes cost justified or "potentially viable" is when there are more than 2 DS3s of traffic on a loop to a location or 12 DS3s of traffic on a transport route.[70] If anything, the RBOC maps reveal that self-deployment of loops is quite rare, even in the most dense urban business districts.[71] Incredibly, RBOCs attempt to make self-provisioning look feasible by relying on aggregate data regarding competitive alternative networks. For instance, SBC contends that CLECs are not impaired without access to DS1 UNEs in 91% of wire centers that have at least 15,000 or more business lines because there is at least one lit building and that on average there are just over 10 lit buildings in those wire centers.[72] If anything, this aggregate data proves that there is a limited availability of alternative DS1 facilities out of these wire centers and that CLECs would be impaired without access to them. Nor does this data show that self-provisioning to these locations is justified at the DS1 level or if the loop facilities are available to them on a wholesale basis.[73]

Third, the RBOCs' findings rely on the erroneous assumption that one carrier's deployment to any particular location means that it would be cost justified for any other

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[70] *See* AT&T Comments at 33 (citing Fea-Giovannucci Dec. ¶¶ 24, 34-36 and D'Apolito-Stanley Dec. ¶¶ 15-26).

[71] *See* AT&T Comments at 68-71, Selwyn Dec. ¶¶ 45-46.

[72] SBC Comments at 89; *see also* BellSouth Comments at 45 (noting that 86% percent of the central offices with CLEC lit buildings are in central offices with more than 5,0000 business lines); Verizon Comments at 82.

[73] Qwest also argues that demand for loop construction can be aggregated among CLECs to make loop construction to a location cost justified. Qwest Comments at 85. However, there is no evidence in the record that such cost-sharing arrangements are feasible.

competitor to deploy loops to that location, or that any competitor could deploy loops to any other location, whether in the same MSA or even in the same business block, or that it would be cost effective for such provider to do so.[74] As further explained below, while one competitor may find it economically feasible to construct a lateral from its metro fiber ring to a particular location (based solely on its unique circumstances with regard to committed traffic and short distance of customer location from its fiber network) that does not necessarily mean that any other carrier whose facilities are farther away or who does not have a significant customer base in that location could economically deploy loops to that same location. Moreover, even in the limited instances where a particular competitor has committed revenues and has metro fiber that is very close to the location it wishes to serve, it can still be foreclosed from constructing its own facilities if it cannot obtain a building permit, rights-of-way, or reasonable and timely access to a entire building from the landlord or building manager. Similar concerns apply to transport routes because the economics of replacing ILEC-provided transport facilities is both carrier specific and route specific. Indeed, the mere fact that one carrier may have sufficient traffic to justify replacing incumbent facilities with self-provided transport facilities does mean that other carriers have enough traffic to do so or that another carrier can overcome these operational barriers associated with deploying fiber facilities on a given route.

Fourth, the RBOCs argue that competitive carriers can and do seek out competitive suppliers of fiber, even where it means relying on a patchwork of different networks that are

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[74] RBOC UNE Fact Report at III-31; BellSouth Comments at 47; SBC Comments at 87-88; Verizon Comments at 47.

"daisy chained" together rather than just using the facilities of the ILEC.[75] They further suggest that carriers can establish ubiquitous networks without using the ILEC because such carriers routinely interconnect with each other and therefore each separate carrier effectively gets the competitive reach of all of the competitive fiber networks combined.[76] These RBOC contentions rely on the incorrect assumption that loop and transport at the DS1, DS3, and dark fiber level is available at wholesale.[77] And even where it would be theoretically possible to piece together portions of a network from multiple wholesalers, the Commission has previously found that such extensive daisy chaining is costly and inefficient.[78] In addition, the use of multiple suppliers makes it far more difficult to identify and isolate network outages or other problems, which is why competitive carriers and their customers prefer to avoid these arrangements.[79]

RBOC suggestions that a CLEC patchwork daisy chained network would meet customer demands and expectations are absolutely wrong. In reality, when business end-user customers evaluate competitive alternatives to an ILEC's high-capacity service, the critical factors they

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[75] RBOC UNE Fact Report 2004 at III-17, 29; SBC Comments at 66; Qwest Comments at 78; Verizon Comments at 38 & 45.

[76] RBOC UNE Fact Report, at III-17-18, III-29; SBC Comments at 66; Qwest Comments at 78.

[77] *See* QSI Report at 2-3. The costs and operational hurdles of wholesaling at the DS1, DS3, or dark fiber level, combined with the market for such services do not support wholesaling operations or the tremendous fixed costs associated with implementing a fully mechanized OSS for such operations similar to those offered by the ILECs. AT&T Comments at 46, Fea-Giovanni Dec. ¶ 22; *see* ATX *et al.* Comments, BayRing Dec. ¶ 9.

[78] *TRO*, ¶ 402.

[79] AT&T Comments, Fea-Giovannucci Dec. ¶ 22; *see also* Ad Hoc Users Report at 21.

consider are service quality, reliability and security, price and network ubiquity.[80] If CLECs cannot utilize RBOC underlying facilities to do so, CLECs cannot satisfy their "customer's standards for purchase and use."[81] Because of these considerations and according to Ad Hoc Users, pure facilities-based CLEC services that do not rely on the underlying facilities of an ILEC to offer ubiquitous services "rarely" meet these high customer end user expectations and this in turn hinders the business data service market from being effectively competitive.[82] Consequently, it is unsurprising that the data from the state impairment cases do not evidence any ubiquitous competitive deployment of wholesale DS1, DS3 and dark fiber loops and transport .[83]

Fifth, Verizon offers data designed to show the extent to which competitors have deployed loops to buildings with high overall telecommunications expenditures.[84] These figures are, however, entirely inapposite to a determination of impairment because (a) there are typically many customers in a building, (b) individual customers often do not give a competitor their entire demand, and (c) these figures do not account for the fact that enterprise demand is typically tied up in multi-year agreements (so the amount of revenue opportunity available at an individual building is inherently unknown). For these reasons, total building revenue is not a direct measure of anything related to the impairment inquiry.

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[80] Ad Hoc Users Report at 21

[81] Ad Hoc Users Report at 21.

[82] Ad Hoc Users Report at 21.

[83] *See* QSI Report at 2-3; AT&T Comments, Fea-Giovannucci Dec. ¶¶ 18-23, Selwyn Dec. ¶¶ 45-46.

[84] Verizon Comments at 50.

Sixth, RBOCs also suggest that the Commission assume away any CLEC impairment because access to high-capacity facilities is available from aggregators.[85] The RBOC UNE Fact Report explains that one consolidator provides access to 535,000 buildings and another provides access to 20,000.[86] However, since the RBOC UNE Fact Report reveals that CLECs serve only 32,000 buildings with their own fiber,[87] the overwhelming majority of these building locations are served by the ILECs and consequently the aggregators are apparently reselling special access services. In the first place, as noted above, the availability of special access cannot form the basis for a non-impairment finding. Second, the RBOCs have not explained if these aggregators provide DS1, DS3 or dark fiber loops. Nor have they explained if the facilities are available throughout the entire building at each of these locations. Finally, there are 3 million office buildings in the United States and even if there are sufficient competitive wholesale alternatives at the 555,000 buildings supposedly "served" by aggregators, CLECs would still be impaired without access to DS1, DS3 and dark fiber as UNEs in the remaining 82 percent of the buildings.

Seventh, RBOC assumptions that cable and wireline networks serve as intermodal competition is a half-baked notion at this time. The RBOC UNE Fact Report demonstrates that fixed wireless is nascent technology and the evidence reveals that there are many kinks that need to be worked out before it could meet business customer network reliability standards.[88] Indeed,

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[85] RBOC UNE Fact Report at III-19-20.

[86] RBOC UNE Fact Report 2004 at III-19.

[87] RBOC UNE Fact Report 2004 at I-2.

[88] RBOC UNE Fact Report 2004 at III-24 (citing and quoting CLECs who note that they are just starting to "look" at or consider this technology)

XO, one of the nation's largest holders of fixed wireless spectrum, has submitted a sworn declaration aptly noting that widespread deployment of DS1 level fixed wireless loop levels will not occur anytime in the near future. XO deployed and tested equipment from four leading manufacturers and none of it performed at a level required for commercial acceptance.[89] XO believes that at some distant time in the future, wireless loops will likely be able to function as substitute for more than five DS1s or DS-3 loops in some situations; however, it has emphasized that we remain years away from being able to do so.[90] It has further exclaimed that fixed microwave suffers from many technical problems and the business plans of other major wireless carriers, such as Teligent and Winstar who employed the most aggressive effort to bypass loop alternatives, failed as a result.[91] Apart from the technical limitations of fixed wireless, XO also emphasized that this technology faces other non-operational barriers such as obtaining rooftop rights. Ad hoc Users share similar sentiments.[92] Services like WiMax are years away from commercial viability.[93]

Likewise, the RBOCs overstate the significance of cable competition. [94] RBOCs submit that large, medium and small sized business customers are using cable modem service for "at

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[89] XO Petition, Sobieski Dec. ¶ 4; *see also* AT&T Comments, Selwyn Dec. ¶¶ 109-112; Ad Hoc Users Report at 23-24.

[90] XO Petition, Sobieski Dec. ¶¶ 5, 9; *see also* Ad Hoc Users Report at 23-24.

[91] XO Petition, Sobieski Dec. ¶ 6; *see also* Ad Hoc Users Report at 23-24.

[92] Ad Hoc Users Report at 23-24.

[93] Daniel Sorid, Technology-Internet Report; WiFi Successor Called High-Speed Hype, For Now, Yahoo News, October 17, 2004, also available at http://story.news.yahoo.com/news?tmpl=story&u=/nm/20041017/wr_nm/bizwireless_dc_3

[94] RBOC UNE Fact Report 2004 at III-36-37; Verizon Comments at 51-52; SBC Comments at 87; Qwest Comments at 82.

least some high-capacity services."[95] However, cable modem service is not a substitute to the services that are provided over high-capacity fully integrated voice and data circuits.[96] First, cable facilities they serve fewer than one percent of the three million commercial buildings in the United States.[97] Second, because of service reliability and security concerns, cable modem offerings are not a substitute to wireline offerings for many business customers.[98] For instance, cable networks do not have the same degree of back-up electrical power as do typical wireline networks, and the "shared platform" nature of cable modem service raises data security and transmission issues that are of significant import to business customers who routinely transmit highly important and mission critical data. Cable and fixed wireless are so insignificant as an alternative to the incumbents' high-capacity services that they should not play a role in the impairment analysis.

**b) RBOC Allegations Regarding CLECs are Unreliable**

The RBOCs' case is primarily based on allegations regarding other carriers that are exaggerated, untrustworthy, and fraught with errors. It is therefore clear that information submitted by the RBOCs with respect to other CLECs' deployment of fiber networks must be "independently verified before it is accepted as fact and relied on by the Commission."[99] For example:

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[95] ILEC UNE Fact Report at I-10; Verizon Comments at 51.

[96] *See* Ad Hoc Users Report at 22-23.

[97] AT&T Comments, Selwyn Dec. ¶ 115; *see also* Ad Hoc Users Report at 23.

[98] *See id.*; XO Petition, Tirado Dec. ¶¶ 13, 14.

[99] Pac-West Sep. 7, 2004 Ex Parte Letter at 1-2

- Based on unsubstantiated GeoTel and GeoResults data, the RBOC Report named certain CLECs as self-provisioners and wholesalers of certain capacity levels on certain routes or at specific locations even though such CLECs expressly denied, either through sworn testimony or discovery responses under oath, the truth of such information.[100]
- Verizon's attachment 8 to its July 2, 2004 Ex Parte filing, identified fourteen MSAs in which it claims Pac-West constructed its own fiber optic networks. However, Pac-West recently clarified the record and made clear that "the information being proffered by Verizon as it pertains to Pac-West is wrong. In fact Pac-West owns no fiber. Pac-West serves all customers via facilities obtained from other carriers, with much of that being obtained from the ILECs."[101]
- The RBOC UNE Fact Report states that McLeod has 1,500 buildings on-net, but McLeod reported in the second quarter of 2004 that it provides services solely over UNE-L, UNE-P/M and resale facilities.[102]
- SBC claims that approximately 5.9 million business lines are served by CLECs and that "the overwhelming majority of CLEC switch based business lines are served without the use of any unbundled last-mile high-capacity facilities."[103] However, a straightforward analysis using the same data reveals that as few as 245,120 business lines are not provisioned over unbundled loops, or 4.2% of the 5.9M business lines.[104]

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[100] QSI Report at 11, 13, 17, 19.

[101] *Id.* at 2..

[102] *See* RBOC UNE Fact Report 2004 at III-4; AT&T Comments, Selwyn Dec. ¶ 39.

[103] SBC Comments at 84.

[104] On page II-41-42 of the RBOC UNE Fact Report 2004, it states that based on Commission data there are approximately 3 million mass market lines served via unbundled loops. The same section references the *TRO* and confirms that the vast majority of these lines serve business customers. RBOC UNE Fact Report 2004 at II-41-42. The FCC estimated that about only 200k were for residential. *See id.* (citing *TRO*, ¶ 440) Assuming that residential lines increased to 300k (even though the "Fact Report" admits that the overall total of 3M lines has not changed), that leaves about 2.7M loops for mass market business customers. Next, the 115K DS1s and the 290 DS3 UNEs referenced by SBC on page 84 of its comments must be converted to equivalent access line numbers. To measure the full capacity of these enterprise loops the number of DS1s need to be multiplied by 24 and the DS3s need to be multiplied by 672 (24x28). This yields a total of 2,760,000 (115,000 x 24) Voice Grade Equivalents ("VGEs") derived from DS1 loops and 194,880 (290 x 672) derived from DS3 loops. Thus, the total number of business lines that could possibly be served by enterprise loops is 2,954,880 (2,760,000+194,880). Subtracting that figure and the 2.7 mass market business lines from the 5.9M business lines (5.9M-2.7M-2,954,880) equals 245,120 business lines not provisioned over unbundled loops. This amount is 4.2 % of the 5.9M business lines, hardly an "overwhelming" majority.

- The RBOC UNE Fact Report incorrectly asserts that Time Warner offers a range of high-capacity circuits. Time Warner has made it clear that it "cannot deploy DS1 loops" and usually "cannot deploy its own DS3 loops" unless it has customers that are demanding multiple DS3 capacity at a single location.[105]
- The RBOC UNE Fact Report incorrectly asserts that XO has deployed its own DS1 facilities. However, XO's recent Emergency Petition demonstrates that it is uneconomical for XO to build facilities satisfy that capacity level.[106]
- RBOCs rely on out of context and exaggerated information provided on the websites of certain CLECs.[107] An Administrative Law Judge with the Michigan Public Service Commission recognized this manipulation of information and rejected SBC's claims that a certain CLEC was a wholesale provider when the CLEC attested that it was not.[108]
- RBOCs also incorrectly assumed that certain CLECs self-provisioned transport routes between each and every CLEC fiber based collocation despite explicit denials that such transport routes existed and/or included routes for which CLECs were not providing service at the DS3 or dark fiber capacity levels.[109]
- RBOCs identified CLECs as wholesalers despite their express denial that they did not engage in this activity.[110]
- Many CLECs denied providing dedicated transport between wire center collocations, but those were nevertheless included by RBOCs.[111]
- The RBOC data ignores the fact that even though certain CLECs indicated they provisioned fiber optic loops to certain buildings, most of those CLECs indicated they did not deploy dark fiber loop facilities.[112] In fact, at least one CLEC testified that its typical deployment of fiber to a building involved only connecting fiber strands that were being

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[105] Time Warner Telecom Comments at 4.

[106] *See generally* XO Petition at 26.

[107] QSI Report at 11, 13, 17, 19.

[108] *See On the Commission's Own Motion to facilitate the implementation of the Federal Communications Commission's Triennial Review determinations in Michigan*, Case No. U-13796, Administrative Law Judge's Notice of Proposal for Decision, at 33 (Mich. P.S.C. May 10, 2004) ("MI Trigger Order").

[109] QSI Report at 17.

[110] *Id.*

[111] *Id.*

[112] QSI Report at 11.

lit by fiber optic equipment to the ring at the manhole.[113] The remaining unused fiber in the sheath would remain unspliced at the manhole, providing no dark fiber connectivity from the building back to the CLEC's node.[114]

The QSI Report confirms what CLECs, end users, and the Commission have known all along - the alternatives to ILEC DS1, DS3 and dark fiber loop and transport facilities are virtually nonexistent and that the RBOC case is not credible or sound. It shows that if the Commission adopts a general unbundling rule on remand that is primarily (not exclusively) based on the TRO's capacity thresholds, there would be a tiny number of "false positives," i.e., cases in which the ILEC would be required to unbundle UNEs when CLECs are not impaired. Despite these errors, the RBOCs continue to rely on unverified data from GeoResults and GeoTel.[115] Their unsubstantiated and error-laden data should not be accorded any weight in determining whether CLECs are impaired without access to DS1, DS3 and dark fiber loops and transport.

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[113] QSI Report at 11.

[114] QSI Report at 11.

[115] Verizon Comments at 43-44, & 48; Verizon's July 2, 2004 Ex Parte Letter, Attachment 1 at 10 and 13; SBC at 67 & n.219 (citing its Aug. 18, 2004 *ex parte*); BellSouth's Oct. 1, 2004 *Ex Parte* Letter at n.5; Qwest Aug. 20, 2004 *Ex Parte* Letter at 3. The GeoTel data purportedly reveals all the competitive fiber facilities that have been deployed, whereas GeoResults reveals which buildings are served by lit fiber of competing carriers.

### 3. The Various RBOC Proposals Must Be Rejected Because They Are Unsupported and Rely Heavily on the Availability of Special Access

#### a) The Commission Should Reject RBOC Proposals that Request the Elimination of DS1, DS3, and Dark Fiber Loop and Transport UNEs from Wire Centers that Have 5,000 or More Business Lines

Verizon and BellSouth propose that, at a minimum, UNEs should not be available on an unbundled basis in wire centers that have 5,000 or more business lines based on their allegation that there is a 53% chance that the wire center has a fiber-based collocator.[116] This proposal relies on the availability of special access as an alternative to unbundling, which as explained previously does not eliminate impairment. Next, they assume that alternative DS1, DS3, and dark fiber loop and transport facilities have been self-deployed or are available on a wholesale basis in the 53% of the wire centers where there is fiber-based collocation.[117] As discussed previously, self-provisioning loop and transport facilities at these capacity levels is not cost justified and the odds are miniscule that these facilities will be available on a wholesale basis from alternative providers on certain transport routes or to serve entire customer locations served by these wire centers. Apart from these fatal shortcomings, these proposals virtually guarantee a 100% false negative impairment determination, *i.e.*, a finding of non-impairment where there is impairment, for 47% (100%-53%) of the remaining wire centers that do not have fiber collocations.

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[116] Verizon Comments at 65-66, 82; BellSouth Comments at 39-50; RBOC UNE Fact Report at III-29. Verizon's initial proposal is that high-capacity UNEs should be abolished altogether.

[117] *See* RBOC End Users Report at III-29.

SBC makes a similar proposal, although limited to DS1 transport and loops.[118] In particular, SBC proposes the elimination of all DS3 and dark fiber loop and transport UNEs and DS1 transport between wire centers with 10,000 or more business lines and 5,000 or more business lines and loops out of wire centers that have more than 15,000 business lines. SBC states that its proposal is reasonable because one or more CLECs have obtained fiber-based collocation in approximately 56% of SBC's wire centers with 10,000 or more business lines and that one or more CLECs have obtained fiber based collocation in approximately 20% of SBC's wire centers with between 5,000 and 10,000 business lines.[119] With respect to wire centers that have more than 15,000 business lines, SBC further explains that there are usually more than 10 lit buildings served by them.[120]

For the same reasons that Verizon's and SBC's proposals fail, SBC's transport proposal does as well. It would result in excessive false non-impairment findings because it is based primarily on the notion that CLECs can use special access to compete or that they can justify self-deploying DS3 and dark fiber transport routes between these wire centers or that such transport routes are widely available on a wholesale basis (which is not the case). Beyond this, it

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[118] SBC Comments at 76-82, 88-92.

[119] SBC Comments at 78. SBC also proposes that to the extent the Commission orders unbundling of DS1s between wire centers or to certain locations it must limit the number of DS1s a CLEC can order on a given route to 8, so as to prevent CLECs from making end-run around any DS3 unbundling limitation that may be established. SBC at 79 n.253 & 89 n.278. SBC maintains that eight DS1 is the cross-over point at which it becomes cost effective to purchase a DS3 instead. The Commission need not adopt such a threshold because to the extent it is more efficient and cost effective to deploy a DS3, CLECs will do so.

[120] SBC Comments at 89.

incorrectly assumes that fiber-based collocators offer DS1 services and fails to show that transport routes between end offices with 10,000 business lines or more and wire centers with more than 5,000 business lines justifies self-deploying facilities for DS1 transport on those routes. Nor does it show that wholesale DS1 transport is available from alternative providers at these wire centers.

SBC's 15,000 business line loop proposal is also flawed. It too improperly assumes that CLECs can compete using special access and that competitors can justify self-deploying DS3 and dark fiber services or that such facilities are widely available on a wholesale basis. Further, it is grounded on the incorrect notion that fiber-based collocators that operate out of wire centers with more than 15,000 business lines offer DS1 loops out of those offices and that it is cost justified to deploy DS1 loops to all customer locations out of those offices. Like the other RBOC proposals, SBC's proposal should be rejected because it is internally flawed and too prone to significant erroneous non-impairment determinations.

Large enterprise customers. Verizon contends that CLECs should not be able to obtain high-capacity DS1, DS3 and dark fiber loop and transport UNEs to serve large enterprise customers, which includes Fortune 1000 companies and large public institutions.[121] It states that these customers are the most valuable segment of the telecom industry, are major purchasers of high-capacity services, and account for more than 85 percent of total special access revenues purchased by end-user business customers. It states that it has only begun to compete seriously for such a lucrative market that already faces intense competition.

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[121] Verizon Comments at 67-69; *see also* RBOC UNE Fact Report III-32.

First of all, large enterprise customers do not at all agree with Verizon's contentions and have explained that this market segment is not sufficiently competitive.[122] Second, there is absolutely no need to have a separate impairment analysis for large enterprise customers because the capacity test described herein suitably addresses whether CLECs are impaired when serving large enterprise customers. The same holds true for large public institutions. For these reasons, Verizon's request has no merit and should be rejected.

High-Capacity Circuits Used to Transmit Packet-Switched Services. Verizon also contends that competing carriers are leading providers of high-speed packet switched services that make up much of the demand for enterprise customers.[123] Because of this, Verizon submits that competing carriers do not need to purchase high-capacity transmission facilities as UNEs to provide their own high-speed packet switched services (which they supply such as Frame Relay and ATM), but instead provide these services using their own high speed transmission facilities, or by obtaining them from an alternative supplier, or by purchasing special access from the ILEC. Verizon appears to be asking the Commission to impose a use restriction on UNEs. Under the Act and FCC rules, CLECs are entitled to "nondiscriminatory access to network elements on an unbundled basis."[124] Verizon is basically asking that it be given the right to discriminate based on how CLECs use DS1, DS3 and dark fiber network elements that are

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[122] *See* Ad Hoc Users Report at 11-26.

[123] Verizon Comments at 69-70.

[124] Pursuant to 251(c)(3), CLECs are entitled to "nondiscriminatory access to network elements on an unbundled basis...on rates, terms, and conditions that just, reasonable, and nondiscriminatory." In addition, pursuant to 47 C.F.R. § 51.309(a) the Commission's rules provide that an "ILEC shall not impose limitations, restrictions, or requirements on the use of unbundled network elements."

available on an unbundled basis. To the extent they are available on an unbundled basis, CLECs have the same right to provide packet switched services over these facilities that Verizon does.

Wire centers in which business lines account for more than 30 percent or more of the total lines in those wire centers. Verizon contends that CLECs should not be able to obtain high-capacity UNEs out of wire centers where business lines account for more than 30 percent or more of the total lines. It submits that 33% of these wire centers have fiber based collocation and that 75% of its special access revenues are generated from these wires centers.[125] This proposal suffers from infirmities similar to those infecting Verizon's proposal that precludes DS1, DS3 and dark fiber UNE availability at wire centers with 5,000 business lines; however, the odds of an erroneous non-impairment determination under this proposal are far greater, and therefore, the proposal should be rejected quickly.

MSAs where competitive facilities providers are located and can supplement their facilities and serve customers using special access. Verizon urges the Commission to eliminate unbundling of DS1, DS3 and dark fiber UNEs in the MSAs where it has received special access pricing flexibility.[126] Verizon claims that the test for pricing flexibility is more stringent than the impairment test because under the pricing flexibility test it must show that competitors "have made irreversible, sunk investments," whereas under the impairment test, the relevant inquiry is whether competition is "possible" regardless of whether competitive facilities have been deployed and the fact that competitors can use special access to compete. As discussed

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[125] Verizon Comments at 82.

[126] Verizon Comments at 83.

previously, the availability of special access and whether an ILEC has special access pricing flexibility or not is not relevant to a UNE impairment analysis. Special access aside, Verizon's impairment analysis is squarely wrong because although it may be "possible" to tear up a street to deploy a DS1 loop to a location or between wire centers, such a decision would be uneconomic and imprudent. Moreover, Verizon's argument cannot overcome the fact that wholesale alternatives do not generally exist on a widespread basis at the DS1, DS3 and dark fiber capacity levels.

Outside of the MSAs where Verizon has received pricing flexibility, Verizon further requests that the Commission eliminate unbundling of DS1, DS3 and dark fiber loop and transport facilities "in which at least half of the DS1 loops served by the incumbent LEC in that MSA are in wire centers where competing carriers have deployed fiber, and where competing carriers in those wire centers have high-capacity connections to end-user customers either over their own or other competitive fiber or though special access obtained from ILECs."[127] Verizon submits that this approach would enable the Commission to make an MSA-wide finding where there is actual competition for the high-capacity business of end-user customers in a significant percentage of the wire centers within that MSA. This proposal, as with its proposal above and its proposal to eliminate access to DS1, DS3, and dark fiber out of end offices with 5,000 or more business lines, it improperly relies on the availability of special access as a substitute and utterly fails to recognize impairment at the DS1, DS3 or dark fiber level as discussed herein.

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[127] Verizon Comments at 84.

**b) Qwest's Proposals Should Be Rejected**

Qwest requests the Commission to: (1) Prohibit CLECs from converting existing special access to high-capacity loop or transport UNEs;[128] (2) Not base an impairment finding on the differences between TELRIC and special access prices; (3) Not permit CLEC to obtain addition UNE loop or transport facilities on a given route; (4) Not allow CLECs that are already purchasing special access loops or transport from a given wire center to obtain UNEs from that wire center; (5) Not require loops and transport be unbundled out of wire centers that the ILEC offers special access services. Because these requests are based entirely on the presumption that the availability of special access justifies a non-impairment finding (which for the reasons explained elsewhere in these comments is not the case), they do not warrant consideration.

## B. The Commission Should Reinstate the Loop and Transport Capacity Based Test Established in the *TRO* and Use It as a "Bright Line" Impairment Test or at a Minimum Adopt the ALTS proposal

### 1. The Capacity Thresholds in the *TRO* Are Extremely Conservative

The Commission received evidence from numerous parties in the *TRO* that definitively showed that competitors are impaired in their ability to economically construct facilities on a given loop or transport route unless they have a minimum number of DS3s of committed traffic. The Commission determined that based on the evidence submitted that competitors can not feasibly self-deploy facilities unless they have a minimum of 2 DS3s of committed traffic for

[128] SBC also requests in passing that the Commission prohibit special access to UNE conversions. SBC Comments at 61.

loops and 12 DS3s for transport.[129] These thresholds have never been directly challenged by the incumbents and were not criticized by the D.C. Circuit.

In fact, based upon the evidence compiled by the Commission, if any criticism of these thresholds is warranted it would be that the thresholds were overly generous to the incumbents. For example, in term of the loop threshold, having 2 DS3s of committed traffic would only justify the economic expense of the self-deployment of facilities in the limited circumstances where a competitor's metro fiber ring is within 500 to 1000 feet of the building.[130] Deploying loops for less than 2 DS3s of traffic is almost never economically justified for competitors.[131] These relatively short distances in which the deployment of fiber would be justified shows that the capacity limits are significantly over-predictive of non-impairment for competitors. This is because there are many cases where the competitive carrier has committed traffic above the 2 DS3 threshold but the costs involved make self-provisioning uneconomical. In these situations, the fact that committed traffic is over the 2 DS3 threshold would create a determination that "no impairment" exists even when impairment in fact is present. The impairment determination for loops is very closely aligned to the particular set of circumstances in the location but there are virtually no cases where a competitive carrier could economically self-provision loops at thresholds lower than 2 DS3s committed traffic. Indeed, in many cases where a competitor has

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[129] *TRO*, ¶¶ 324, 388.

[130] AT&T Comments at 30. In fact, based upon the average revenue generated from a DS3 and assuming extremely favorable outside plant costs, the actual distance that a carrier could economically justify deployment of a loop to serve 2 DS3s is closer to about 350 feet. AT&T Comments at 36-37.

[131] AT&T Comments at 34; *see also*, XO Petition at 28-29, MCI Comments at 131.

committed traffic above the threshold levels, the record demonstrates that it is still economically unjustified to self-provision the loop.[132]

Importantly, when determining if it is economically worthwhile to build loop facilities to a particular location, the amount of potential traffic at the location is not relevant when determining if it is economically worthwhile to build, but rather it is the amount of committed traffic that is relevant. In addition, it must be recognized that the distance involved in building facilities to connect a location will vary widely between competitive carriers based upon the location of its nearest fiber access point. As such, the fact that one carrier may have sufficient committed traffic in conjunction with a short enough build to economically provision a loop to a building does not mean that other carriers will be able to economically self-provision the building. This fact underscores that the relevant geographic scope for loop deployment must be location and carrier specific. The incumbents' own data showing the sporadic deployment of loops for competitive carriers lends support to the presumption that the presence of one competitive carrier in a building or area does not mean that other carriers are not impaired.[133]

The analysis for transport similarly shows that a 12 DS3 cap on transport is over-predictive of competitive non-impairment. The record shows that traffic levels below this threshold virtually never economically justify self-provisioning transport.[134] In fact, in many cases where the minimum threshold of 12 DS3s are reached the competitive carrier frequently

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[132] *See e.g.* XO Petition at 28-29.

[133] AT&T Comments at 68-70. *See generally* Verizon July 2, 2004 *Ex Parte Letter*; SBC August 18, 2004 *Ex Parte Letter.*

[134] AT&T Comments at 34; *see also*, XO Petition at 28-29, MCI Comments at 131.

declines to build the transport links because the costs involved still outweigh the benefits to the company.[135] The record demonstrates that the threshold amount of 12 DS3s of committed traffic would only economically justify self-provisioning facilities when the incumbent wire center is within 1 mile of the competitor's network.[136] Only in cases where there is an extremely short transport route, such as with entrance facilities, can competitors even consider self-provisioning of transport at levels just above the 12 DS3 threshold.[137] As the distances increase, so do the level of traffic that a carrier must have to economically justify building its owns facilities. By the time that distances for transport reach the level approximate to the distance between two incumbent wire centers, competitors could never realistically reach the level of traffic necessary to justify self-provisioning.

Although evidence shows that there has been virtually no deployment under these thresholds and even if facilities were, that does not in itself establish that competition is likely on that or any other route with similar capacity. The evidence makes clear that such a decision is not the norm but an extreme anomaly. It also does not suggest that such decisions support the deployment of facilities on other routes where the capacity thresholds are not met.

### 2. Evidence Supports a Conclusive and Irrebuttable Finding Impairment for Loops and Transport

In the absence of evidence of substantial market specific variations in impairment, a nationwide impairment finding that rests on evidence of national conditions is valid. In fact, the

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[135] AT&T Comments at 48.

[136] AT&T Comments at 30.

[137] AT&T Comments at 43; *see also Ex Parte* Letter from Steve A. Augustino, counsel for SNiP Link, to William Maher, FCC CC Docket No. 01-338, at 2 (Feb. 7, 2003).

only set of circumstances when an undifferentiated national finding of impairment would be found to be invalid is where there is evidence that markets "vary decisively."[138] The data compiled by the states in connection with the state impairment cases definitively support the conclusion that it is virtually always uneconomical for competitive carriers to deploy their own facilities if they do not have the traffic volumes identified in the capacity limits.[139] The data was compiled in a wide variety of states with different geographic and demographic profiles, but the data consistently shows that in the vast majority of cases, competitors cannot economically deploy facilities under the threshold for committed traffic volumes established by the Commission.[140] The Commission would therefore be justified in adopting a nationwide standard of impairment below the capacity limits.

The adoption of a nationwide standard of impairment below the threshold for committed traffic volumes need not be accompanied with any self-provisioning triggers because the capacity levels themselves adequately identify a potential for self deployment. Such triggers would present an administrative burden that is offset by very little, if any, real world benefit. The Commission correctly determined that the expected revenues to be derived form the

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[138] 359 F.3d at 570.

[139] *See* QSI Report at 2-3.

[140] A review of the 14 state proceedings with the most complete factual record sponsored by several competitive carriers indicates that there are proportionally very few routes or locations where the incumbents even challenged the Commission's national impairment finding and that there are very few legitimate exceptions to the Commission's national determination. QSI Report at 1-3. In fact, the data compiled by the states indicates that the assumption that impairment exists for committed traffic volumes below the threshold was correct 99.66% of the time for transport in New York state and similar percentages in other states for both loop and transport. AT&T Comments at 55; *see also* Comments of the New York State Department of Public Service at 16-17.

provision of stand-alone DS1-based loops are obviously insufficient to economically justify self-provisioning in almost any set of circumstances. As such, the Commission thought it unnecessary to adopt any "self-provisioning trigger" for either DS1 loops or transport. The same arguments hold true for self-provisioning of loops or transport at thresholds lower than 2 DS3s for loops and 12 DS3s for transport. Self-provision those facilities is almost never economically justified, so there is no practical reason to initiate a self-provisioning trigger.[141] The only effect that such triggers would have is to create an enormous administrative burden for the Commission and carriers. The overwhelming evidence collected by the states support this conclusion. In addition, determining impairment based on this strict standard is highly conservative because it does not factor operational entry barriers (such as inability to secure rights of way, permits, construction moratoriums, or access to buildings) into the equation. These additional and potential barriers would serve to raise the threshold rather than lower it.

Likewise, the application of the wholesale trigger is unnecessary given the very little evidence that DS1, DS3, and dark fiber are available on a wholesale basis. The QSI report makes clear that there are few instances of wholesale availability of these services. Given this lack of evidence and the administrative burdens associated with applying the wholesale triggers, the Commission need not apply them.[142] The Commission should therefore adopt the established traffic thresholds as the bright line test for determining impairment.

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[141] AT&T Comments at 41-43.

[142] *See USTA II*, at 574. If the Commission were to retain the wholesale trigger, it should involve no more than some type of self-certification from the CLECs regarding what facilities they offer at certain locations and between wire center routes and at what capacity levels. As indicated in our initial comments, such information should not be assumed. ATX *et al.* at 38-42.

### 3. Alternatively, the ALTS Proposal Should be Adopted

Assuming the Commission does not strictly apply the above bright line test to determine the availability of DS3 transport as a UNE, the Commission should adopt the approach suggested by ALTS. For all the reasons stated in ALTS' comments, this provides an approach that fully addresses the concerns of *USTA II* while accurately identifying impairment.[143]

## IV. CLECS ARE IMPAIRED WITHOUT ACCESS TO ENTRANCE FACILITIES

BellSouth argues that entrance facilities should not be included within the statutory definition of "network elements," and even if they were a network element, the Commission should find that competitive providers are not impaired without unbundled access to them.[144] While the other RBOCs do not join BellSouth's argument that entrance facilities are not a network element, they do echo BellSouth's arguments that CLECs are not impaired without access to ILEC entrance facilities.[145] The RBOCs state that entrance facilities are the most competitive type of transport link because they are the point of greatest aggregation of traffic, they are deployed on an as-needed basis in response to CLEC requests, and that, therefore, the RBOCs have no competitive advantage over the CLEC in building them. The RBOCs also claim that CLECs have been steadily replacing entrance facilities obtained from RBOCs with their own competitive transport.[146] On this basis, the RBOCs argue that the Commission should find no impairment and no impairment for entrance facilities. As demonstrated below, these

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[143] ALTS , *et al.* Comments at 77-86.

[144] BellSouth Comments at 51, 55.

[145] SBC Comments at 70, Verizon Comments at 80-81.

[146] *Id.;* BellSouth Comments at 54.

arguments ignore the reality of the marketplace and how network facilities are built and deployed.

BellSouth is just plain wrong that entrance facilities are not network elements under Section 153(29) of the Act for purposes of unbundling. The D.C. Circuit has already rejected similar arguments based on the plain language of the statute, finding that the Commission's reasoning in the TRO for excluding entrance facilities as network elements "appears to have little or no footing in the statutory definition."[147] In addition, ILECs have traditionally extended their network to provide entrance facilities to other carriers, as their federal tariffs amply demonstrate. Entrance facilities are correctly considered part of the ILEC network and are subject to unbundling if CLECs are impaired without them. Therefore, as the D.C. Circuit found, the Commission must make an impairment analysis to determine whether unbundling is required.[148]

With respect to impairment, there is no basis for treating entrance facilities differently from dedicated transport. Alternatively, entrance facilities might be considered a loop. In either event, the Commission should apply the appropriate impairment test. There is no need or basis for a separate test or determination with respect to entrance facilities.

Apart from the above, Commenters urge the Commission to clarify that regardless of the treatment of entrance facilities, transport facilities used for interconnection pursuant to § 251(c)(2) must be provided at TELRIC. As the Commenters indicated in their initial comments,[149] sections 251(c)(2) and 252(d) of the Act along with FCC orders require ILECs to

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[147] *USTA II*, 359 F.3d at 586.

[148] *Id.*

[149] ATX et al Comments at 50-52.

offer interoffice dedicated transport facilities at TELRIC-based rates when the facilities are being used to interconnect with ILECs for routing and transmission of telephone exchange service and exchange access.[150] A clarification from the Commission is needed because ILECs have actively undermined §251(c)(2) and the Commission's clear directive by forcing CLECs to pay special access prices for interconnection facilities. Given this, the Commission should make it perfectly clear that nothing in the Commission's unbundling rules alters the ILEC obligation to provide interconnection using facilities, any facilities, including those facilities that are explicitly not available as UNEs under 251(c)(3), at TELRIC rates for purposes of 251(c)(2) interconnection.

## V. THE COMMISSION SHOULD RETAIN EEL AVAILABILITY AS UNDER CURRENT RULES

In the *TRO,* the Commission established "architectural" safeguards designed to assure that EELs are used to provide a significant amount of local service. [151] SBC now proposes that the Commission (1) modify the ratio of one DS1 trunk for every 24 DS1 EELs to 1 DS1 Trunk for every 5 DS1 EELs; (2) require that CLECs certify that *all* traffic over the EEL is local traffic; and (3) apply the architectural safeguards to stand alone loops and transport or any such facilities that are commingled with special access.[152]

Assuming the Commission chooses to address SBC's request, it should only do so after it has addressed the issues remanded, rather than affirmed, by *USTA II.* [153] Further, the Commission should reject SBC's request to change the DS1 trunk ratio. Nothing has changed

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[150] *See also Local Competition Order*, ¶¶ 628 & 690.

[151] *TRO* at 603-611.

[152] *Id.*

[153] *USTA II* affirmed the EEL standards established in the *TRO. USTA II* at 592-593.

since the Commission found that "[t]he 24-to-1 EEL to interconnection trunk ratio provides a reliable gauge that the competitor LEC exchanges local traffic with the incumbent LEC in a manner that indicates that it is a bona fide provider of local voice service."[154]

The Commission should also reject SBC's request that CLECs be permitted to use EELs only for 100% local service. Requiring CLECs to provide only local service over EELs would, in effect, require CLECs to establish two separate networks one for local and one for long distance service. This would be administratively and economically impossible. And, providing EELs on this basis would violate ILECs' obligation under Section 251(b)(3) to provide network elements on a nondiscriminatory basis since ILECs do not operate such separate networks. Nor is there any basis to apply EEL standards to stand alone network elements. The RBOCs' concern that IXCs would be able to use EELs as a substitute for special access, while exaggerated in any event, does not apply to stand alone elements because it would be impractical for any carrier to use stand alone network elements as a substitute for special access.

For all these reasons, the Commission should reject SBC and other RBOC requests to restrict the availability of unbundled EELs.

## VI. STATES HAVE AUTHORITY TO ORDER UNBUNDLING

### A. The Commission Cannot Preempt the Authority that Congress Reserved to States Through the Saving Clauses of the Act

Verizon argues that *USTA II* requires the Commission to preempt all state authority to order unbundling of a network element unless the Commission had already made a finding of impairment. Verizon asks the Commission to bar states outright from considering whether

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[154] *Id.* at 608.

unique factors exist that might warrant localized unbundling of a network element that the Commission declined to unbundle on a national basis. It also asks the Commission to prohibit states from addressing network elements where no Commission finding of impairment was in effect, including where the Commission's impairment finding had been vacated.[155] The first request would undermine the Act's demand for a granular and "nuanced" concept of impairment capable of considering local variation, while the second request is beyond the Commission's authority to take because it would conflict with Congress' explicit plan to preserve state authority.

Contrary to Verizon's assertion, neither of these requests is required by *USTA II*. *USTA II* did not hold that only the Commission has the authority under the Act to order unbundling. While *USTA II*'s subdelegation holding precludes the Commission from delegating *its* obligations to the states, the decision in no way limits authority that Congress delegated *directly* to states, or the inherent authority that states retained.[156] *USTA II* speaks only to the

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[155] It is already evident that Verizon will likely appeal every Commission unbundling order. Verizon recently stated that the end of "all litigation concerning any Commission unbundling rules ... may not arrive so long as section 251(c)(3) remains in effect." Docket 98-141, Verizon Comments at 7 (October 4, 2004).

[156] *See e.g., Application of The Southern New England Telephone Company For a Tariff to Introduce Unbundled Network Elements – TRO*, Docket No. 00-05-06RE03, Decision at 3 (Conn. Dep't of Public Utility Control, August 25, 2004) ("The actions of the DC Circuit Court to vacate the federal rules does not diminish the authority of the Legislature or the requirements it has imposed on telecommunications service providers by state statute.")

Commission's obligations under the Act;[157] the states' independent state law authority – which is explicitly preserved by the savings clauses – remains unaffected by *USTA II*.[158]

The savings clauses in the Act unambiguously reflect Congress' intention to allow states to impose additional unbundling obligations based upon federal or state law, so long as their requirements are consistent with and do not substantially prevent implementation of Section 251. *See* TRO at ¶ 180, describing sections 251(d)(3), 251(e)(3), and 601 of the Act. As the Commission concluded previously, "If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act."[159] The Act not only permits but requires state commissions to consider unbundling above and beyond the Commission's national list of network elements. Section 252(e)(2)(B) provides that state commissions can only approve arbitrated interconnection agreements that meet the requirements of Section 251 of the Act, "including" Commission regulations. Had Congress intended that states only consider whether an agreement meets the requirements of Commission regulations, it would have had no reason to ask states to consider anything more. Accordingly, even where the Commission makes a national finding of non-impairment, the state commissions are still required by section 252 to at least consider possible variations in impairment in different geographic and customer markets

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[157] Verizon's comments even add italics to emphasize the words that undermine its position: "the D.C. Circuit 'vacate[d], as an unlawful delegation of *the Commission's § 251(d)(2) responsibilities* ... Verizon Comments at 116 (emphasis Verizon's).

[158] If there were any doubt that the states' independent authority survived *USTA II*, the court itself said so. *USTA II* found that states had not yet been preempted from seeking to impose additional unbundling requirements. *See USTA II*, 359 F.3d 554, 594 (D.C. Cir. 2004) ("deferring judicial review of the preemption issues until the FCC actually issues a ruling that a specific state unbundling requirement is preempted").

[159] *TRO*, ¶ 192.

that would warrant unbundling under the terms of the Act and the Commission's impairment standards.[160]

Both of the two sources of law cited by Verizon fail to support its proposition that states are "barred" from considering unbundling requirements where the Commission had not previously found impairment.[161] Verizon cites ¶¶ 192-195 of the TRO. However, in this very same section, the Commission explicitly held that "We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law."[162] Moreover, this section of the *TRO* only addressed network elements for which the Commission had found non-impairment, not network elements for which no impairment determination had been made – a scenario in which state action is all the more important to assure that an interconnection agreement meets the requirements established by the Act. Second, Verizon cites a statement by the Seventh Circuit that states could order unbundling "only in very limited circumstances, which we cannot now imagine." As an initial matter, this statement referred only to packet switching, for which the TRO had made a comprehensive finding of national non-impairment. But more importantly, the court concluded that despite its inability to imagine the circumstances that would warrant a state unbundling order where the FCC had found non-impairment, that fact

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[160] *Accord USTA I*, 290 F. 3d at 426 (demanding at "a more nuanced concept of impairment").

[161] Verizon Comments at 117.

[162] *TRO*, ¶ 192.

"does not entirely foreclose" the state's consideration as part of its independent determination of whether an interconnection agreement satisfied the requirements of the Act.[163]

The savings clauses in the Act would be rendered a nullity by Verizon's further argument that states can *only* order unbundling already ordered by the Commission. The Connecticut Department of Utility Control recently found that SBC's similar interpretation of Section 251 "would render [the savings clause in] § 251(d)(3) meaningless," explaining that:

> If the FCC's lack of determination equated to a finding of non-impairment for the purposes of preemption, then state commissions can produce no independent regulations which would be "consistent with" and "not substantially prevent the implementation of" the Telcom Act. ... Additionally, when employing [SBC's] reasoning, the state would be left solely to regulate network elements that the FCC has previously determined meet an impairment standard. ... In that environment, state regulations could only exist if they mirrored federal regulations. If such a regulatory framework were the intent of Congress, it would have provided for that requirement in § 251(d)(3). The Department further believes that if this were Congress' intention, it would not have created the state authority "carve-out" exception in that section.[164]

Verizon's position would leave the states only to rubber-stamp the decisions of the Commission and helpless to act when the Commission had not. Congress clearly did not intend to so limit the states, especially from acting in a manner that promotes the goals of and that is consistent with the Act. Verizon must therefore take its request to Congress, as the Commission is not authorized to override Congress' specific plan to preserve independent state law authority to the extent permitted by the savings clauses.

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[163] *Indiana Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 394 (7th Cir. 2004) (citing *TRO*, ¶ 192).

[164] *Application of The Southern New England Telephone Company For a Tariff to Introduce Unbundled Network Elements – TRO*, Docket No. 00-05-06RE03, Decision at 11 (Conn. Dep't of Public Utility Control, August 25, 2004).

As an apparent alternative proposal, Verizon suggests that the Commission should commit to expedite consideration of future petitions to preempt state unbundling orders. Commenters have no objection to promptness of regulatory decisions, which helps provide greater certainty to all parties. However, there is no reasonable basis to adopt Verizon's further proposal to turn upside down the normal process by placing the burden of proof on the defendant state commissions, rather than the petitioning ILEC.[165] If nothing else, under ordinary principles of comity, state regulators deserve better from the Commission than to be considered guilty until proven innocent.

Verizon is correct that states cannot order unbundling "without regard to the federal regime."[166] But it is Verizon that disregards that fact that the federal regime provides for and depends upon the exercise of independent state authority. The Commission must therefore reject Verizon's calls for blanket elimination of the state role in implementing the goals of the Act.

### B. States have the Authority to Set Rates for Section 271 UNEs

The RBOCs contend that Section 271(d)(3) preempts states from regulating the rates charged by the RBOCs for intrastate wholesale services that happen to be Section 271 checklist items.[167] The RBOCs also argue that Congress did not reserve any jurisdiction to the states to regulate rates, terms and conditions of section 271 UNEs and any such attempts should be preempted.[168]

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[165] Verizon Comments at 119-120.

[166] Verizon Comments at 115.

[167] BellSouth Comments at 77-81, SBC Comments at 114-118.

[168] SBC Comments 116-117.

Nothing in the statute provides that the Commission has exclusive jurisdiction to set section 271 UNE rates.[169] Under section 271(d)(3), only the Commission can "determine[]" whether to approve or deny a RBOC's application to offer interLATA long distance service. Once an application is granted, the Commission may under the statute (presumably after receiving a section 271 complaint) "determine" if a RBOC has ceased to meet any of the conditions required for the approval of its application and may order the RBOC to correct the deficiency, impose penalties, or suspend or revoke such approval.[170] However, a state setting market based prices for section 271 UNEs does not constitute grant of an application or the resolution of a section 271 complaint.

Moreover, as pointed out in Commenters' initial comments, the Act specifically preserves state authority over intrastate communications. In particular, the 1934 Act established a system of dual state and federal regulation over telephone service, where the Commission is generally forbidden from entering the field of intrastate communication service, which remains the province of the states.[171] The Commission's ability to preempt state regulation of intrastate telephone service is limited. Consistent with the *New England Public Comm. Council* and *New York* decisions cited by Commenters,[172] it would be unlawful for the Commission to preempt state commissions from exercising their section 152(b) authority and setting prices for 271 UNEs, at least for intrastate service, because, as noted above, nothing in section 271

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[169] AT&T Comments 175-176.

[170] *See* 47 U.S.C. § 271(d)(6).

[171] ATX *et al.* Comments at n.152.

[172] *Id.* at 54.

unambiguously and straightforwardly prohibits states from doing so. Therefore, in the absence of an express statutory provision reserving to the Commission the exclusive role of setting post-grant section 271 pricing, states retain the authority to set prices for Section 271 UNEs.

### C. The Commission Should Deny the RBOCs Petitions for Forbearance

Shortly after the issuance of the *TRO,* RBOCs inundated the Commission with a flurry of petitions for forbearance from imposing 271 obligations on "broadband" or "next generation" elements. In their submissions, the RBOCs provide no new evidence for the relief they seek and simply request the Commission to grant each of their respective repetitive petitions for forbearance.[173] As noted by numerous parties in the respective proceedings, the RBOCs have failed to meet the statutory standards for forbearance and their petitions should be denied.[174]

In particular, Commenters note that the premise of such petitions, *i.e.*, that removal of an element from the Section 251 UNE list calls for removal of the corresponding item from the Section 271 checklist, is fallacious. As ratified by the Commission in the *TRO*, Section 271 imposes obligations on RBOCs that are "independent of, and go beyond," those obligations imposed by Section 251 on ILECs.[175] Moreover, RBOCs have failed to meet the standards of Section 10[176] because under its Section 10 analysis, the Commission has required a much more

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[173] BellSouth Comments 70-77, SBC Comments 109-110, Verizon Comments at 143.

[174] *See e.g., In the Matter of New Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c),* Comments of Allegiance, *et. al*, CC Docket 01-338, filed November 17, 2003;and *In the Matter of Bellsouth Telecommunications Inc., Petition for Forbearance Under 47 U.S.C. § 160(c)*, Opposition of Cbeyond Communications *et. al.*, CC Docket 04-48, filed March 15, 2004.

[175] *TRO* at ¶ 653.

[176] 47 U.S.C. § 160.

mature development of competition in a market than what is evidenced nowadays in the local exchange market. In many areas of the U.S. there is still no competitive choice for consumers, and the only check on RBOC pricing continues to be regulation and not competition. In addition, Section 10(d) precludes any forbearance from any Section 271 provisions until the requirements of Section 271 are "fully implemented." Contrary to the RBOCs' assertions, Section 271 cannot be deemed now to have been "fully implemented" if Section 251(c)(3) has not. Local markets must be fully opened to competition before the Commission can even begin to consider deregulation. Finally, RBOCs, claim that by granting their petitions for forbearance, the Commission will promote further investment by allowing RBOCs to invest significantly in next generation networks. Contrary to their view, providing RBOCs additional relief in the form of eliminating unbundled access to broadband facilities from their Section 271 obligations, would not only disrupt competition, but as demonstrated by RBOCs' past performance, will not have a clear effect on additional investment. For these reasons, Commenters request that the Commission deny each of the forbearance petitions filed by the RBOCs.

## VII. FURTHER TRANSITION SAFEGUARDS ARE REQUIRED

### A. The Commission Has Jurisdiction to Set a Transition Period and Should Establish a Differentiated Transition Period Tailored to each Element

The RBOCs contend that the Commission does not have the authority to grant a transition period and that the interim and transitional rules proposed by the Commission do not comply with *USTA II*.[177] Contrary to these contentions, the Commission has broad authority under Section 201(b) of the Act to provide for a transition period and nothing in that provision limits

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[177] SBC Comments at 120, Qwest Comments at 89-92.

the Commission's ability to set rates during a reasonable transition period.[178] In fact, the Commission has previously established longer transition periods to minimize marketplace disruptions. For example, the three-year transition period for line sharing established by the *TRO*[179] was subsequently upheld by *USTA II*. The three-year transition period was established by the Commission to avoid disruptions to the DSL market and to provide a reasonable glide path away from CLECs availing themselves of this UNE.[180] In adopting this long transition period the Commission also noted that "[i]t is entirely appropriate to fashion a transition period of sufficient length to enable competitive LECs to move their customers to alternative arrangements and modify their business practices and operations going forward."[181]

As requested by Commenters and others,[182] the Commission can and should establish a multi-year transition period in the event that it finds non-impairment with respect to one or more elements. In the Commission's own words a transition period is "a glide path from a regulatory/pricing regime to another."[183] The Commission should conduct an in-depth analysis with respect to each element for which it finds non-impairment and adopt a differentiated transition period for each element type. During each such transition period, the element should be subject only to gradual price increases over a number of years to ensure that there are no

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[178] *TRO*, ¶ 267.

[179] *Id.* ¶ 264-271.

[180] *Id.* 265.

[181] *Id.*

[182] CompTel/ASCENT Comments at 47; AT&T Comments at 205.

[183] *Id.* at 267.

"precipitous rate increases"[184] and the almost inevitable ensuing significant disruptions to the millions of consumers served by CLECs.

## VIII. THE COMMISSION MAY NOT EXPAND BROADBAND UNBDUNDLING RELIEF TO ENTERPRISE CUSTOMERS

The Commission should reject Verizon's proposal to expand the *TRO*'s broadband unbundling exemption to the enterprise market, or, in the alternative, to define the "mass market" to include all businesses with 48 or fewer telephone lines. Verizon has failed to support its proposals with any serious factual, marketing, or empirical information that could justify such a sweeping elimination of its unbundling obligations under the Act.

The Commission explained in the *TRO* that it exempted unbundling of fiber-to-the-home and next generation hybrid loops because it wanted to incent ILECs to build these facilities, which at present have been deployed only in small numbers. The Commission found that "removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market."[185] The Commission subsequently clarified that this unbundling relief with respect to mixed-use premises applies to loops serving "predominantly residential" customer premises.[186] The Commission's limitation of unbundling relief is consistent with the record, which shows that ILECs need no further incentives to build out broadband capabilities to enterprise customers. Whereas the Commission found that "FTTH loop deployment [to mass market customers] is still

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[184] *Interim UNE Order*, ¶ 29.

[185] *TRO*, ¶ 278.

[186] *Review of the Section 251 Obligations of Local Exchange Carriers*, CC Docket 01-338, Order on Reconsideration, FCC 04-191, ¶ 4 (rel. Aug. 9, 2004).

in its infancy,"[187] ILECs have *already* deployed broadband facilities to most of these customers, and even where they have not, they need no special incentives to do so. Enterprise customers generally demand such capabilities, and ILECs willingly build them without the need for further inducement provided by the Commission. Thus, the Commission recently concluded that "the record shows additional investment incentives are not needed" to incent ILECs to deploy broadband-capable loops to enterprise customers.[188] Since the ILECs do not need any additional incentives to deploy broadband to enterprise customers, the Commission does need to expand unbundling relief.

Therefore, the ILECs' unbundling obligations for the enterprise market should continue to be established in according to the impairment standard as intended by Congress. As demonstrated in Section III above, CLECs are impaired without access to DS1, DS3 and dark fiber loops. Since there is no basis to eliminate unbundling in order to incent ILEC deployment of these facilities, the Commission must base its unbundling rules on the results of its impairment analysis, and not upon Verizon's sweeping generalization that all ILEC broadband-capable facilities should be exempted from the Act.

Nor should the Commission accept Verizon's back-door attempt to accomplish the same result by its proposal to define all business customers with 48 or fewer telephone numbers as "mass market" subscribers.[189] While Verizon is correct that the *precise* definition of "mass

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[187] *TRO*, ¶ 274.

[188] *Review of the Section 251 Obligations of Local Exchange Carriers*, CC Docket 01-338, Order on Reconsideration, FCC 04-191, ¶ 8 (rel. Aug. 9, 2004).

[189] While Verizon claims that a definition that depends on telecommunications capacity could become outdated by changes in technology, capacity, if not a perfect measure, is at least a

market" was not established by the *TRO*, the Commission explained clearly its intent that "[m]ass market customers consist of residential customers and *very small* business customers."[190] The *TRO* further explained that "very small" business customers are distinct from small business customers generally and "typically purchase the same kinds of services as do residential customers, and are marketed to, and provided service and customer care, in a similar manner."[191] This description of the mass market was consistent with the finding in the *UNE Remand Order* that the mass market consists "largely [of] residential customers" and that "a rule that provides access to unbundled local switching for requesting carriers when they serve customers with three lines of less captures a significant portion of the mass market."[192] Businesses with 48 telephone numbers fall well outside these descriptions of a "very small" business that is part of the "mass market." Instead, there is no basis for assuming that the Commission has ever intended that the mass market encompass any significant category of business customers.

The Commission's definition of a "very small" business for purposes of the impairment analyses is informed by a recent report commissioned by the Small Business Administration (SBA) that surveyed and analyzed the use of telecommunications services by small businesses.[193] The *SBA Survey* found that the median small business in the United States has

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more accurate measure of the value of the services purchased by the customer and the potential profit for the carrier as compared to telephone numbers that can be assigned with little correlation to the cost or margin of such service.

[190] *TRO*, ¶ 127 (emphasis added).

[191] *TRO* at n. 432.

[192] *UNE Remand Order* at ¶¶ 291, 293.

[193] "A Survey of Small Businesses; Telecommunications Use and Spending" prepared by TeleNomic Research, LLC for the Office of Advocacy, United States Small Business

only three employees and has approximately $200,000 in annual revenues.[194] Small businesses in these categories, according to the *SBA Survey*, purchase on average of 1.5 to 2.0 telephone lines each,[195] and do not purchase T-1 services.[196] If the median small business only uses 2 telephone lines, then there is no reasonable basis to interpret the definition of a "very small" business to include business that purchase more than that number of lines – much less ones that purchase services with up to 48 telephone numbers.

In any event, section 251(d)(2) requires that the Commission's unbundling determinations be made based upon its evaluation of impairment, not on definitions of mass market and enterprise market. A generic definition of mass market therefore cannot drive a conclusion to eliminate UNEs; instead, the results of the Commission's impairment analyses must drive the definition of mass market for purposes of the broadband exemptions. As demonstrated above, CLECs are impaired without access to loops to provide services to business customers, and there is no countervailing basis to determine under the standards of the Act that the Commission needs to provide further incentives to the incumbents to upgrade their loop facilities to the premises of businesses that purchase three or more lines. Therefore, the Commission need not address this issue because it can rely on its earlier determination that the

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Administration (March 2004), http://www.sba.gov/advo/research (last viewed October 18, 2004) ("SBA Survey").

[194] SBA Survey at 7-8.

[195] SBA Survey at Figure 6 (Small Businesses with revenue of less than $200,000 average 1.68 local telephone lines); Figure 32 (Small Businesses with 0-4 employees average 2.03 local telephone lines).

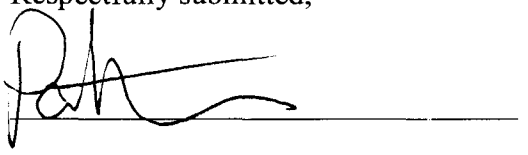
[196] SBA Survey at 11 ("the smallest of businesses do not use dedicated high-speed lines called T-1 lines").

mass market consists of premises for which the customer purchases telecommunications capacity of less than four DS-0 lines.

## CONCLUSION

The Commission should conclude this proceeding, in accordance with the recommendations herein and as set forth in Commenter's initial comments, at the earliest possible date.

Respectfully submitted,



Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Philip J. Macres
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

Counsel for
ATX Communications, Inc.
Freedom Ring Communications, L.L.C. d/b/a BayRing Communications
CTC Communications Corp.
Focal Communications Corporation
Globalcom, Inc.
Mpower Communications Corp.
Ntelos, Inc.
RCN Telecom Services, Inc.
TDS Metrocom, LLC

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